

THE LEGAL NATURE OF CORPORATIONS

BY
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Submitted in partial fulfilment of the requirements for the
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PREFACE.

The subject of the following essay belongs to a field of study and investigation that has been comparatively little cultivated in this country: the analysis of the nature of legal conceptions without immediate or exclusive reference to practical questions. Such analysis is apt to lose itself in metaphysical speculations and refined distinctions of little substantial value: it has therefore fallen into some measure of disrepute even in Germany, where legal science and abstract jurisprudence were for a long time almost convertible terms. It is certainly not necessary for practical purposes to carry every legal doctrine back to its ultimate foundations in logic and psychology; but there is always some danger that an error in fundamental conceptions may lead now and then to incorrect practical conclusions, or—a less objectionable alternative—to unsound reasoning in order to support a sound decision. An exhaustive analysis of elementary legal ideas can therefore hardly fail to be of some practical value.

The question of the nature of corporate existence has a peculiar interest and fascination. Few writers on the subject of corporations ignore it altogether, and our courts have repeatedly enunciated their views as to what a corporation really is. The result is that our law has its accepted theory of corporate existence, while it can hardly be said to have such a theory with regard to the nature of contract, obligation, or incorporeal property. If we have an accepted theory, it is worth while to examine it as to its truth.

The problem of corporate existence has a much wider than simply legal bearing. It has an even greater interest to the sociologist than to the jurist. But I have confined myself to

the corporation as a legal institution, ignoring the subject of association as a factor in economic, social, and political life.

I have treated the subject analytically and not historically, because my object was to establish an elementary conception, and not to ascertain an existing legal doctrine. I have not even dealt with the question how incorporation has come to be a conception of property law exclusively, believing that the nature of corporate existence is not affected by this historical limitation. The history of the corporate idea on the Continent of Europe has been most exhaustively treated by Professor Gierke in his great work on *Deutsches Genossenschaftsrecht*; with regard to the history of our law, we have valuable monographs, and a chapter in Pollock and Maitland's History gives an account of the conception of the English law prior to the period of technical incorporation; but the history of the law of corporations, like that of other parts of our law, remains as yet unwritten.

There are other phases of the subject of corporations which might seem to have called for examination in connection with this essay; above all the difference between the several classes of corporations, public and private, stock companies and societies for collective benefit, incorporated associations and incorporated trusts; also the nature and effect of incorporation. I propose to treat these and cognate subjects separately, and have omitted them here, because in my opinion the nature of corporate existence can be demonstrated independently of them, and because it seemed desirable to confine this essay to its primary subject, which is sufficiently abstract and difficult to claim undivided attention.

E. F.

THE UNIVERSITY OF CHICAGO,
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I. STATEMENT OF THE PROBLEM.

§ 1. The Term "Corporation."—The recognition of rights belonging to groups of persons in common is probably as old as the conception of any legal right, for different forms of community property occur in very early stages of civilization. When legal theories begin to be formulated, the instinctive feeling that such rights do not belong to the members of the groups as their individual rights do, finds expression in the recognition of groups of persons as distinctive holders of rights and especially of property rights. The common law designates such a group as a corporation or body corporate. The term dates from about the beginning of the fifteenth century; in 1411 we find the townsmen of Plymouth petitioning that they may be a "*corps corporat.*"¹ Prior to that time the English law had no one comprehensive technical term to cover the various ecclesiastical and lay bodies, chapters and colleges, cities and boroughs, guilds and fraternities, which enjoyed common rights. The word "*communa*" or "*communitas*" came nearest expressing the collective conception and capacity of an aggregate body, but it appears to have been applied chiefly to municipalities and guilds.² The Roman jurists and the Mediæval civilians and canonists spoke of *corpus*, *collegium*, or *universitas*. To the present German law the term corporation is familiar. The French codes and statutes have no term corresponding to our "corporation," to express the distinctive capacity of municipalities (*communes*); stock companies (*sociétés anonymes*), and public institutions (*établissements publics*). The word corporation is foreign to the technical language of French jurisprudence as well as of

¹ Gross, the Guild Merchant, I, p. 94.

² Gross, II, pp. 34-36.

legislation, except as an equivalent for professional guild or association.¹

§ 2. **The "Juristic Person."**—The Germans emphasize the distinctiveness of the corporation by calling it a legal or juristic person (*juristische Person*). The French jurists use the analogous term "*personne morale*," and similar expressions are sometimes met with in English and American jurisprudence. The Germans distinguish different kinds of juristic persons: associations (corporations in the narrower sense), funds or endowments legally secured to certain purposes (*Stiftungen*), the state as a holder of property (*Fiskus*), and the estate of a decedent before it becomes vested in the heir (*hereditas jacens*). This may appear to extend the conception of juristic personality somewhat beyond that of the corporate holding of rights. But if we except as of little importance the *hereditas jacens*, an idea of the Roman jurists, unknown to the common law, we find that all other species of juristic persons assume in our law the corporate form. Our terminology indicates that the rights of eleemosynary foundations and of the state are vested in bodies or aggregates of persons, while that of the Germans points to the fact that the element of association is insufficient to explain the peculiar qualities of rights held by some kinds of corporations. The problem of corporate existence is under the two legal systems practically the same, and in both it is complicated with questions regarding the nature of trust rights.

§ 3. **Corporations in Relation to Government and Property.**—We commonly distinguish two principal classes of corporations, public and private. The former includes the state and municipal and other corporations constituting territorial or administrative subdivisions of the state; the latter, all other bodies incorporated for common purposes of the members, for individual profit, and for eleemosynary objects. It might appear that this distinction coincides with that between the two principal classes of rela-

¹ Viollet, *Histoire du droit civil français*, p. 647.

tions known to the law, government and property. But if we understand government in a wider sense, it must be incident to corporate property relations, and on the other hand corporate government is apt to produce corporate property. For the undivided control of joint rights requires that each associate should be subjected to some restraint in the interest of common action, and his participation in the joint control is conditioned upon his submission to such restraint; to this extent every corporation must enjoy some powers of government over its members, however rarely they may be called into play. Conversely the exercise of governmental rights by a body of persons will as a rule result in the possession of some property, if it be only the records of proceedings, the necessary apparatus and fixtures for the holding of meetings, or the ownership of fees or other contributions. That incidental property rights may assume vast proportions is sufficiently demonstrated by the example of the state and of large cities.

The technical conception of a corporation has grown up in connection with property and not with governmental rights. The problem of corporate existence is substantially the same whether we regard it from the point of view of government or of property, but the difficulties that have made themselves felt, and the theories that have been presented for their solution, have arisen chiefly with regard to property relations and their incidents of personal capacity. In this essay the corporation will therefore be treated primarily as a property-holding body.

§ 4. **The Doctrine and Its Difficulties.**—The legal recognition of institutions and bodies of persons as distinctive holders of rights under a collective name constitutes a definite doctrine, accepted by the courts, the legislature, and the legal profession as part of the system of the common law, and influencing the technical treatment of practical relations. Negatively expressed this doctrine means, that the rights held by a corporation are not the rights of any physical person, that its members are not

the part owners of the corporate property, nor part creditors or debtors of the corporate claims and obligations. It follows from this that, although a person cannot contract with himself, or be both plaintiff and defendant in the same action, a corporation can enter into a contract with one of its own members, can sue him or be sued by him, that a member cannot set off a corporate claim against his own debt, nor a corporate debtor use a claim against a member for the like purpose; it follows that the corporation can hold property in its own name, and that no change of title takes place, if members are lost or added. The doctrine suggests the question: if the corporation is a distinct person in law, of what nature is this person? Can we conceive of the holding of rights otherwise than as an attribute of physical personality? How is it possible, upon any other basis, to deal with notions that are constantly applied to the holding of rights, and which explain their most important incidents: intention, notice, good and bad faith, responsibility? How can we establish, unless we have to deal with individuals, the internal connection between act and liability?

It is obvious that two opposite views may be taken of the problem thus presented: we may hold that the legal doctrine which sees in the corporation a distinct person, is contrary to truth and fact; then a supplementary question will be: what is the truth which the doctrine veils and obscures? Or we may hold that the doctrine correctly expresses actual relations; then we shall ask further: of what nature is the distinctive person, which appears in the corporate holding of rights? In the first case we deal with a fiction, in the second with an organic reality, and we may therefore distinguish a fiction theory and an organic theory.

§ 5. The Fiction Theory.—Those who call the corporation an artificial and fictitious entity, deny to the idea of a distinct legal person substantial reality. They argue that if we treat the corporation as distinct from any of its members, and claim that the rights of the former are not the rights of the latter, we come

in conflict with the evident and axiomatic proposition that the aggregate is nothing but the sum of its parts. Again, if we treat this distinct entity as if it had volition and acting capacity, and apply to it legal provisions involving both, we run counter to another axiomatic proposition, namely, that only human beings are endowed with such moral and mental qualities as are required for the responsible exercise of rights. It follows that the legal conception of a corporation cannot be reconciled with fundamental truth and logic, it has no basis in the reality of facts, it is a fiction adopted for the purpose of deducing rights and obligations which could not be deduced with equal facility from a conception corresponding to the true nature of things.

The fiction theory strongly predominates at the present time. It is accepted almost without questioning by our courts and is tacitly assumed by most English and American jurists. The writers on elementary law are ranged on its side. Austin speaks of "fictitious and legal persons." Holland says that the law, "in imitation of the personality of human beings, recognizes certain groups of men or of property which it is convenient to treat as subjects of rights and duties, as persons in an artificial sense."¹ "Such a person is not merely the sum total of its component members, but something superadded to them. It may remain although they are all changed. The property which it may hold does not belong to the members either individually or collectively, its claims and liabilities are its own."² Markby states that every right resides in a determinate person or persons, but that rights are sometimes attached to an aggregate of human beings in such a way that the aggregate is looked upon as a single person, a fictitious person, of course; also that there is no difficulty in creating an imaginary person which does not contain any real person.³ It is true that some text-book

¹ Jurisprudence, 8th ed., p. 82.

² *Ibid.*, p. 300.

³ Markby, Elements of Law, §§ 161, 136, 138.

writers, following the authority of Kyd, the author of one of the earliest treatises on corporations,¹ are inclined to repudiate the notion of a fictitious and artificial person, and to substitute in its place the conception of a collective capacity of the members of the corporation, but they fail to present an adequate analysis of this conception.² The fiction theory has also dominated the civil law since the Middle Ages, and while greatly questioned in recent times, continues to find advocates among the ablest continental jurists.

How do the adherents of the fiction theory explain the nature of the corporation if it is not what it pretends to be? It seems strange that many of them should deem it perfectly sufficient to proclaim the conception as false and contrary to the reality, without yet feeling obliged to show what the reality is. Austin says, the nature of legal persons is various, and the ideas for which they stand are extremely complex. They are persons by figment and for the sake of brevity in discourse. By ascribing rights and duties to feigned persons instead of the physical persons whom they in truth concern, we are frequently able to abridge our descriptions of them.³ Holland and Markby do not even attempt an explanation, and the same is true of many German writers. Evidently there is room for doubt and difference of opinion. If the corporation is a fictitious person, the corporate rights must belong to other physical and real persons, or they must be rights without personal holders. Which is the true view? Or must one view be adopted with regard to one class of corporations, another view with regard to a different class? Are the rights of business corporations the rights of the shareholders, and the rights of charitable corporations in reality nobody's rights? And how can we conceive of rights without personal holders? All these questions are suggested by the

¹ *Law of Corporations*, I, pp. 13 *sq.*

² Morawetz, *Private Corporations*, § 227.

³ Austin's *Jurisprudence*, 5th ed., p. 354.

fiction theory, and have been variously answered, where an answer has been attempted. It is evident that only an examination of these questions can show what the fiction theory really means, and whether the resort to a fiction is justifiable or necessary.

§ 6. **The Organic Theory.**—The fiction theory has been strongly assailed in recent times by a number of German jurists, who insist that the distinctiveness of the corporate personality is as real as the individuality of a physical person. The fiction theory maintains that the attribute of personality, involving unity of volition, belongs to the individual only, and the application of the term to composite bodies must rest upon a figure of speech adopted for convenience of reasoning. Upon this point the advocates of the new theory join issue. Professor Gierke, the most prominent representative of this theory, insists that the physical individual represents only one type of personality, that he is not the sole possessor of such volition, acting capacity, and inherent unity, as we hold essential to the conception of a person. Above the existence of the individual there is the existence of the species, and the corporation is nothing but the legal expression of this fact, which appears as a reality in all other spheres of life. As the individual will is embodied in the physical person, so the higher will of the species is embodied in numerous and various forms of association, and as a result we find, beside the individual, entities of a higher order endowed with volition and acting capacity. And where the law recognizes such embodied will as a person, we have a juristic person or a corporation. The law does not create the corporate person, but finding it in existence invests it with a certain legal capacity. The corporation rests upon a substratum of physical persons, but it is not identical with them, for out of the association of the individuals the new personality arises, having a distinctive sphere of existence and a will of its own. If corporate rights are distinguished from individual rights it is because they are controlled

by this distinctive will. The corporation as a person distinct from its members is not a fiction, but a reality.¹

Amidst an apparently irreconcilable conflict of theories there is yet a substantial consensus of opinion as to practical requirements in the legal treatment of corporations. That is to say, it is generally agreed that the law should regard corporations differently from joint owners, that corporate rights and liabilities should be held apart from individual rights and liabilities of the members. It is also generally agreed that this object is best accomplished by treating the corporation, as far as possible, as a distinct person. Yet it is well understood that many attributes of individual personality cannot be applied to this distinct person, and that the fact of its being composed of physical individuals cannot always be ignored. And irrespective of conflicting theories the work of adjudication and legislation has been unceasing in developing and formulating principles, the practical necessity and soundness of which nobody questions.

The proper way of approaching the problem of corporate existence would therefore seem to be: why is it that corporations are treated differently from tenants-in-common and joint-tenants? Upon what practical considerations does the conception of distinctiveness rest? The justification of the legal doctrine must also be its explanation. Both must rest upon an analysis of the corporate holding of rights. And this requires as a preliminary a brief review of the elements which enter into the holding of rights in general, and which distinguish the various classes of rights from each other.

¹ Holtzendorff's *Rechtslexikon*, Art. *Juristische Person*, by Gierke.

II. THE PROTECTION OF INTERESTS, AND THE PRINCIPLE OF REPRESENTATION.

§ 7. Beneficial Rights. Coincidence of Control and Interest.

—Right and law are correlated, and in a measure coterminous ideas, for every complete rule of law consists in the creation or recognition of rights or their corresponding duties, restraints, or obligations. The rule of law arises out of the conflict of human interests, which it tempers and regulates in accordance with the necessities of social existence. The existence of a right or duty means that out of the infinite variety of conditions capable of satisfying human interests, the enjoyment of which is apt to give rise to disputes, a particular portion or sphere is set apart for the gratification of some interest to the exclusion or subordination of others. To this extent it is true, as Professor Jhering has said, that every right is a legally protected interest.¹ But this gives only one aspect of the conception. The gratification of the interest usually requires some active dealing with the conditions so set apart, and this produces the element of control as a second constituent factor in the idea of a right, without which the interest is like a vehicle without motive power. And although the interest is the objective point in every right, and the control merely the instrument to secure it, yet it may happen that the means is legally more important than the end. For while specific conditions satisfy only specific interests, the possibility of transfer and exchange can make one right available for the gratification of an indefinite number of interests, according to the measure of its value. The control then represents above any specific interest, the power and liberty of choosing between different interests, which is in itself, both by reason of its ideal character, and in view of its potential uses, the highest of human

¹Jhering, *Geist des röm. Rechts*, §§ 60, 61.

interests. Where this is the case the law may, in the protection of rights, ignore altogether any specific interests, merging them in the power of control. In this manner nearly all property rights are held: the law ordinarily protects them regardless of the question whether their use subserves any reasonable interest of the holder, whereas some property rights, *e. g.*, easements, and all family rights are recognized only in so far as social or economic benefits are derived from them, and only in so far as they are rationally used.

In order that the interest may be merged in the control two requisites must concur. In the first place, the conditions serving the interest must be transferable from person to person, and in the second place, the interest to be secured must belong to some definite human person capable of exercising control. Both requirements are normally fulfilled in the right of property, the most important and familiar of all rights, which has been of determining influence in moulding our conception of the nature of private rights in general. Since control and interest are here united in one person, the idea of the holding of a right has come to connote both control and interest, emphasizing rather the element of control.

§ 8. **Trust Rights. Separation of Control and Interest.**—It is, however, also possible that the interest of one person may be protected by vesting the requisite control in another. Such an arrangement may be necessary or advantageous; necessary where the person to be benefited is incapable of exercising control, advantageous where he is to be protected against his own unwise acts of disposition. But then the reasoning by which in the normal case of coincidence the interest appears as merged in the control, evidently loses its basis, for the party in control and the party in interest being now different persons, the law must take cognizance of a conflict between them, while where both are one and the same person, a possible conflict of interests would be legally irrelevant as a matter of purely internal concern. As the

control is capable of being turned against the interest which it should guard, it must be qualified and limited, the controlling will must in its turn be controlled by the requirements of the interest to be served.

In this case we speak of a trust. There is a protected interest and therefore a right; but the two elements of a right, control and interest, are separated, and no one person is consequently the holder of the right in the same sense as in the first, the normal, case. The personal inherence of the right is still clear, though divided according to its two aspects, and the question with whom we shall identify the right is simply one of terminology. A serious controversy on the point can only be based upon a disregard of the double meaning of a right. In our law the title is sometimes vested in the trustee, the beneficiary holding an equitable interest, sometimes in the party in interest, the control being exercised under a power in trust.

§ 9. **The Securing of Abstract Interests.**—It has so far been assumed that the interest to be protected belongs to some definite person. But it may also be desirable to secure interests which cannot be identified with specific persons, to recognize, protect, and advance an abstract and ideal object for the benefit of all those who may be capable or desirous of sharing in it, for the benefit, in other words, of humanity and civilization. Lands, buildings, funds, and other resources may thus be devoted to the promotion of science and art, to the cause of religion, charity, and education. Manifestly the control of such property cannot be vested in the parties in interest, whose number is altogether indefinite, who constitute in fact an unascertainable portion of humanity, embracing present and future generations, and who cannot possibly coöperate in the performance of legal acts. Such interests can be legally protected only by vesting the control separate and apart from the interest, *i. e.*, by creating trust rights.

There is here, however, a peculiar difficulty in identifying the

right with the interest. If A controls certain property for the benefit of B, we may call B the holder of the property, not meaning thereby to imply any personal agency on B's part, but merely indicating with reference to what interest the control is to be exercised. If we would accomplish the like purpose where A controls property for the benefit of an abstract and ideal interest, we should have to designate that interest by a name, and identify the holding of the right with that name; for the interest has no distinct personal inherence. This, in fact, is constantly done. We speak of rights held by a museum or a library, by a hospital or by a college. We mean thereby that certain relations and resources are controlled, no matter by what particular individuals, for the service and benefit of well-defined aims and purposes to be pursued under given conditions and through prescribed channels, all of which is understood or can be ascertained by reference to the name of the institution; and conversely an obligation may exist in favor of some person, to be satisfied out of certain funds, no matter through whose agency the payment will be made. We thus personify a complex of interests by assimilating it to a personal beneficiary, being well aware that what we personify has no volition or acting capacity; a fiction which is as harmless as it is useful, like so many others to which we resort constantly for the convenience of thought and speech. In this way we can also understand in what sense the German jurists treat the "*Stiftung*" or trust endowment as a juristic person. The "*Stiftung*" is a "*Zweckvermögen*," a fund belonging to a definite purpose, belonging to it as if the purpose were the owner. The personification of the purpose is necessarily fictitious, and the fiction supplies the absence of any determinate person on the side of the interest, while the control is of course in the hands of real persons.

§ 10. **The Protection of Joint Interests.**—The law may also be called upon to accord its protection to a number of persons in the common enjoyment of an interest. The community of inter-

est and consequent joint relation may be necessary or voluntary. The necessity may result from temporary or permanent conditions. A community of interests representing a temporary necessity exists in the case of the descent of property from a common ancestor to a number of heirs. The necessity is permanent, where a number of persons are alike affected by conditions of indivisible operation believed to be essential to the existence or the welfare of all, and therefore calling for an undivided control on behalf of all; the political community is typical of this class. The joint relation is voluntary, where the united pursuit of common interests, either by the common control of property, or by control of the action of each member, or by both, results in a saving of energy and of resources. For there are many things the enjoyment of which is not necessarily diminished by being shared by a number of persons; and a combination of resources in harmonious coöperation may bring returns to each party far in excess of what he would procure by the separate and independent employment of his own means. The distinct purpose of the joint relation in these cases is the possibility of undivided control through which such advantages are obtained. Nearly all private associations belong to this latter class.

In order that we may speak of the protection of a number of persons in the common enjoyment of an interest, two conditions must concur: the persons must pursue the interest jointly, and the joint interest must be legally secured to them; in other words, there must be a joint relation, and the joint relation must result in joint rights. Either one or both of these conditions are absent from certain forms of community of interest which should be eliminated before we proceed to discuss the nature of joint rights. I shall, therefore, consider, first, community of interest without association, and, second, associations without joint rights.

§ 11. **Community of Interest without Association.**—Without association the identity of interest between several persons is legally irrelevant, though it may be practically of great impor-

tance and lead to a spontaneous and unorganized adjustment of the activity by which the same object is pursued by many persons at the same time. There are great interests which constantly set in motion human activity in the same direction, ideal as well as material, charity, religion, art and science, and the increase of national wealth. But the idea of the joint relation requires in addition to the identity of purpose a connecting tie between a number of persons with reference to that purpose, and this distinguishes the institution from the abstract force as two distinct factors in social life. Powerful as the abstract interest may be in itself, it has no distinct representation in the conflict of interests except through corporate or trust organization (including that of the state) or through the voluntary action of individuals.

The lack of association also characterizes the conception of what is called the public, the mass of the people in the widest sense, indeterminate as to extent and composition, in so far as they pursue identical interests, yet act in that pursuit separately or without deliberate coöperation. If a street, a park, or a museum is thrown open to the use of the public, the service of certain interests is contemplated without restriction to any class or community, but the use is expected to be enjoyed primarily by individuals, and the possibility of simultaneous enjoyment may be practically limited to moderate numbers. If under the privilege of public use a large number of people congregate in the same place, physical proximity will form a kind of rudimentary relation between them. They may constitute an audience, a mass-meeting, a procession, a crowd or a mob, but in neither capacity can they be identified with the public. As a legally disconnected mass of individuals the public cannot control legal rights, but is merely a beneficiary: the rights of the public are exercised by the state or its subdivisions, and in so far as enjoyment is concerned, by any individual who can show an interest.

§ 12. **Associations without the Joint Control of Legal Relations.**—Association by itself does not constitute joint or common right. A number of persons pursuing common interests may meet, deliberate, and resolve upon certain courses of action by which a conflict of interests may be avoided or other beneficial results obtained; yet unless the association as such also exercises a legal control with reference to these common interests, it will be legally irrelevant except possibly from a political or administrative point of view. This applies to the numerous private associations organized for social intercourse, for scientific, literary, artistic purposes, to discuss and agitate political and social reform, or to guard professional or trade interests, which exercise no binding power over their members, and which hold no common property for their purposes.

Political parties should be classed in the same category, for while there is associated and organized action for common purposes, the fruits of the party victory will be held not by the party as such, but by its members as organs of the government. The party desires to be vested with power as representing the people, not as representing the party associates, and the party candidates become officers of the state. The same observation applies to any portion of any community which by concerted action endeavors to control the formation of the community will; for the ideal aim of those coöperating must be to win over all the members and thus to merge themselves entirely in the community. Members of a party may, however, for the better accomplishment of party ends acquire common rights of property, and for that purpose assume corporate character. They will then form a distinct organization with a definite membership, which is not identical with the party in the political sense of the term.

There is no firmer social organization than the family, yet the family as such need not, and at present in most legal systems does not, control any rights. The association here produces

legal relations, for there are rights between members of the family, and rights against third parties based on family relations, but the family itself does not enter into contracts or become a party to litigation, or hold title to real estate. Natural cohesion and organization may exist without the legal protection of the common enjoyment of the common interests.

These forms of association should again be distinguished from relations in which a number of people are subject to a common authority without having joined each other by voluntary acts of mutual connection. In these cases there is strictly speaking no association, but a sum of individual contractual relations entered into by one person with a number of persons acting separately, and affecting them all alike. There is an aggregate body and the aggregation may have its social, moral, or psychological effects, but for legal purposes its existence is irrelevant. Such is the relation between the workmen in a factory, the staff of writers on a newspaper, the pupils or students in a school or college. The factory, the newspaper, or the school may be owned and managed by a corporation, but then the corporation does not coincide with the economic or social organism. There is no joint control vested in the joint parties in interest.

§ 13. **The Joint Holding of Rights. Difficulties of Joint Control.**—Let us now return to the community of interest which is legally secured by the joint holding of rights. The common interest has here a double aspect; it claims security both against outsiders and against defection on the part of members. All parties to the joint relation have an interest in the preservation of the integrity of the common right as against third parties,—an interest as to which perfect harmony is natural, and which is identical with the like interest of the holder of an individual right. And each party may also have as against any other an interest in the preservation of the joint relation and of the undivided control. This interest becomes relevant only where for some reason coöperation between the joint parties fails. As long as

they concur in every act of control, the aspect of the right is exactly the same as that of the normal individual right in which control and interest are united in the same person. But as soon as such concurrence fails as a consequence of disagreement or through other difficulties, the problem arises how the joint holding of the right and the community of interest can be reconciled with each other.

Two different methods of dealing with this problem are conceivable. The law may insist upon concurrent action and offer as an alternative the right to have the joint relation dissolved. In that case the power of active control is suspended or qualified until either concurrence of action is made possible or until the dissolution is consummated. In case of dissolution the interest which any associate may have in the continuance of the joint relation will be sacrificed to what becomes substantially a veto power of any other associate. It is also clear that this method is unavailable where the community relation is based upon permanent necessity and hence indissoluble.

Or as a second method the law may accept the action of those who can be brought to concur in place of the action of all the associates, ignoring those who fail to act, or determining, where all are willing to act, but disagree as to the course to be pursued, which of several contending parties or factions shall prevail over the others. In either case all are bound by a portion which assumes a representative character; in other words, the associates are bound by representation. I call this form of representation original, and distinguish it from that which rests upon delegation and which is common to the exercise of all rights, several as well as joint.

§ 14. **The Principle of Representation.**—Representative action under express delegation, by which joint rights are commonly exercised, is easily understood upon principles of individual right, being analogous to the relation between agent and principal. Since, however, this method of representative action

presupposes an act of delegation, it does not solve entirely the difficulties of concurrent action, which must be overcome with regard to the delegating act, and which are, therefore, only thrown one stage further back and made of less frequent occurrence. Principles of individual right, as generally accepted, are, however, inadequate to explain what I have called original representation, and this form of representation must therefore be further considered.

Original representation assumes two forms, according to the difficulty encountered. Where a number of the joint parties altogether abstain by absence or by silence from expressing their will, those who act are regarded as representing all. Where there is dissension between those who act in expressing their will, the majority overcomes the minority. The former principle, in case of a body consisting of a definite and unchanging number, is modified by the requirement of the attendance of a certain proportion, normally the majority of the members, and is then known as the principle of the quorum, while the latter is known as the majority principle. Both principles are recognized by the common law, being recommended by their comparative simplicity, while a principle of greater intrinsic value, as, *e. g.*, that not the *pars major*, but the *pars major et sanior*,¹ should prevail, is apt to be so much more difficult of application as to be of inferior practical value. Either principle may, of course, yield to different agreement or positive enactment, so that, *e. g.*, a more than simple majority may be demanded where the presumption is in favor of the continuance of existing conditions and arrangements. The principles may also involve considerable difficulties in the details of their operation, and, conceivably, it may be as impossible to bring about the presence of a quorum or the concurrence of a majority as it may be impossible to bring about unanimity. It is sufficient that experience has demonstrated the two principles to be substantially adequate to accom-

¹ Gierke, *Genossenschaftsrecht*, III, p. 325.

plish their object and to secure the community of interest in such a manner that there is the constant possibility of subjecting the joint resources to united disposition, to make, in other words, the joint control an indivisible control.

Where action by representation is recognized we may speak of a collective instead of a mere joint holding of rights.

The collective holding of rights is not legally secured to all joint relations; being opposed to the principles upon which individual several rights are held, it has rather been regarded as the exceptional and abnormal form. We must distinguish joint relations in which the principle of representation is completely absent, and joint relations in which it is imperfectly recognized, from those to which it fully belongs. It will be instructive to examine the former classes of joint relations in order to see what legal protection the common interest enjoys without the operation of the principle.

§ 15. **Joint Relations without Representative Action. (a) Tenancy in Common and Joint Tenancy.**—In tenancy in common and joint tenancy the principle of original representation is completely absent. There may be delegation according to the general rules of agency, but as it proceeds from the will of each party it depends upon the continuing consent of each; the principle of representation is not secured to each party against any other. All parties must concur in every act; there is no outward unity of name, but the formal title is attached to the several joint holders, and upon a change of individuals a change of title is necessary. If the absence of the principle is not felt as a grave defect, it is due to the nature of the relations to which these forms of joint holding are usually applied. Tenancy in common—except where it is an incident to partnership—is apt to be temporary and to tend towards dissolution; frequently it is based upon the accident of common descent or succession, and has no intrinsic guaranties of duration. The question of joint control, therefore, as a rule, presents no serious problem, for

if concurrent action meets with difficulty, a partition dissolving the relation, which is not based upon a strong community of interest, is a ready expedient. Joint tenancy is the usual form of holding by a number of trustees. Here there is unity of interest, and necessity of undivided control, and as the interests of the joint holders are indivisible, partition cannot be resorted to; but the superior control of equitable jurisdiction is sufficient to prevent dissensions from becoming fatal to the interest which claims protection. It is characteristic that tenancy in common, which adheres most closely to the principles of individual right, and follows in fact from their logical application, is also the loosest form of joint relation known to the law. In those exceptional cases in which joint tenants hold beneficially, and not as trustees, the right of partition attaches to their relation as well as to tenancy in common.

§ 16. (b) **Partnership.**—The form of joint relation known as a partnership is in many respects *sui generis*. The partnership has some strong features of unity; in commercial intercourse it is known by a common name, the partnership firm, under which ordinary legal acts are performed. Above all the principle of original representation is partly recognized in the authority of each partner to bind the firm in the ordinary course of business by acts done in the firm name, an authority which rests upon the nature of the relation and not upon express delegation, and the exclusion of which by agreement must therefore be brought to the notice of third parties, in order to be binding upon them. This is usually expressed by saying that each partner is the agent of all others, but it would be better to say that each partner is the representative of the firm. Courts have recognized repeatedly that it is impossible to deal with partnership relations without the conception of unity expressed in the firm name,¹ and the distinctiveness of its existence asserts itself in

¹ *Pooley vs. Driver*, L. R. 5 Ch. Div., pp. 458, 476. *Meehan vs. Valentine*, 145 U. S., 611.

equity in the matter of accounting and especially in the adjustment of individual and partnership liabilities with their respective preferences as to individual and partnership property. The unity of the partnership is also recognized in the so-called joint-debtor acts, under which, in an action against the partners, judgment may be taken against all, though some only are served with process, and execution may be issued upon such judgment against the joint property of the firm.¹ This must be justified by the theory, that as to partnership property—which for that purpose constitutes a distinct fund—each partner fully represents the firm. If this view were carried to its logical consequences the judgment should be treated as a regular judgment *in personam* against the firm and therefore available against firm property wherever found; but it seems that such judgments are not recognized as having extra-territorial effect.² The same view might also well be extended by allowing action to be brought by and against firms, irrespective of changes in membership occurring since the cause of action accrued or during the course of the proceedings, and also irrespective of the fact that one person belongs to two litigating firms. The commercial codes based upon the French law have yielded to this demand for further recognition of the distinctiveness of the firm, which in England and America has been generally resisted by a more conservative spirit of legislation.

While in some respects the undivided control of partnership affairs may be strengthened by contractual stipulations, the relation cannot be said to constitute a perfect form of collective holding. For the principle of original representation fails in transactions beyond the ordinary course of business, as, *e. g.*, in

¹ N. Y. Code of Civil Procedure, §§ 1932-1935.

² *D'Arcy vs. Ketchum*, 11 How, U. S., 165. *Hall vs. Lanning*, 91 U. S., 160, 168. (It does not appear clearly from either case that the action which was brought upon the judgment rendered in the other state, against the partner not served in that state, demanded satisfaction out of the firm property exclusively, but probably there was no intention to hold individual property.)

acts done by deed,¹ nor is it within its range of absolute operation, for it does not prevail against express dissent, nor is there an unqualified recognition of majority rule.² Moreover, the consistence of the community interest has not reached such a point that it is secured against the accidents of death or disability, and if, as a matter of fact, partnerships sometimes enjoy the same longevity as corporations, this duration has no legal guaranties.

The very defect, however, which remains is in one sense an advantage, and may be regarded as an expression of deliberate legal policy. The partnership relation is based upon personal trust and confidence, and the success of the common venture depends upon harmonious and voluntary coöperation; hence death, permanent disability, or gross misconduct are believed to shake its essential foundations and to make dissolution a matter of right. If, however, a partnership for a fixed term is to be upheld, even in case of dissensions, the recognition of the principle of representation, and especially of majority powers, follows as a matter of logical necessity.³

§ 17. **Methods of Joint Holding and the Number of Joint Parties.**—It should be observed that the forms of joint holding in which the principle of representation is not, or not fully, recognized—tenancy in common, joint tenancy, and partnership—have as a rule in common the characteristic feature of a small number of joint parties. This fact is significant if taken in connection with the psychological probability that where the community of interest has any considerable strength, a small number of parties can be brought to concur. Where the joint parties are few, the law by asserting the principle of concurrent action strikes perhaps the proper adjustment between the joint interest and the several interest of individual liberty. But the difficulties of con-

¹ Lindley, *Partnership*, 5th ed., pp. 136-7.

² *Ibid.*, p. 314.

³ *Am. and Engl. Cyclop. of Law, Art. Partnership*, vol. 17, p. 999.

current action increase rapidly with an increase of numbers, and the point is soon reached where they become so great as to make actual joint control impossible.

While therefore small numbers are not merely normal but essential to a successful operation of the rule of actual concurrence of control in joint relations, the principle of representation becomes a practical necessity where the number of associates is considerable. As the history of joint-stock companies shows, large associations tend inevitably to assume the collective form of holding rights, the only other alternative being to debar them from holding rights under their own control altogether, and to protect their common interests by the creation of trusts. This of course does not mean that a few joint parties cannot hold rights collectively, but it does mean that with regard to them this mode of holding is less necessary, and perhaps less apt to produce the best results. It is interesting to note that in Germany it has been thought advisable to allow the formation of partnerships with limited liability (extending to all the partners, and not as in case of our limited partnerships only to some), in order to restrict the character of a joint-stock company to associations of a larger number seeking their constituency among the public at large.¹ The application of the collective principle with all its incidents to joint relations of small membership is a product of recent times, and has undoubtedly been induced by the desire to secure one advantage which is not even essential to this principle, namely, the limitation of liability. A distinction between large companies appealing to the public for the placing of their shares or for membership, and close associations formed of a few persons, might serve valuable purposes under any legal system.

The operation of the principle of representation is apt to differ as it is either applied to large or to small associations. A comparison between two opposite extremes will make this clear. In the political community—the most conspicuous type of a large

¹ Act of April 20, 1892.

association—actual concurrence of all members is impossible, and all direct action must be by original representation, so that only a portion of the members becomes active and generally also so that between them a majority prevails over a minority. Besides, action by original representation will be almost confined to acts of delegation, and the performance of nearly all legal acts must be by delegated representation, *i. e.*, outsiders do not deal with either quorum or majority. On the other hand in a business corporation of three or five members, the acts of delegation will generally be unanimous, many legal acts can be performed by direct action of the body, and the delegated powers are apt to be held by the members, so that only in exceptional cases an associate will lose his share in the joint control. In all associations, however, the recognition of the principle will secure undivided control, and the collective body will consequently act and appear as a unit.

§ 18. **Relation of Control and Interest in Representative Action.**—Where a number of persons hold rights in common and yet need not all concur in every legal act by which these rights are exercised, it is impossible to speak of perfect coincidence of control and interest. Neither is there, however, an absolute separation between the two elements. For while it is true that there are parties in interest who are eventually controlled by the acts of others, they are yet not excluded in the same manner as the beneficiaries of an active trust. This is quite clear in the case of delegated representation where those in control derive their powers from those who have joined in the act of delegation. It is, however, also true that there is no absolute exclusion in the case of original representation. Voluntary abstention from coöperation means acquiescence and submission to the care of those who are more active. Active opposition again on the part of those who are finally ignored means that they are given an opportunity of influencing the formation of the controlling will in its preliminary stages by the assertion of their wishes and opin-

ions, and their not prevailing indicates some form of weakness in their position, the result depending upon a trial of strength. A share in the control is legally secured to all, although it may prove to be incapable of affecting the final act.

Undoubtedly there is a strong element of trust in representative action. The interest of all the associates is a determining factor in controlling those who act as representatives. This is especially clear in the case of delegated representation, and boards of directors and other officers are generally considered and treated as trustees for the corporators. But it also applies to the quorum and the majority, for the security of the joint interests is the justification and therefore also the limitation of their power to represent. Should a majority act for their own benefit clearly adversely to the interests of the association, the minority would not be bound thereby. The difficulty in such cases lies not in the principle, but in the proof of its violation.¹

There are, however, other elements in which the idea of a trust does not appear to be controlling. The quorum and the majority pursue interests which they feel to be their own, and they are justified in following their own discretion in judging what the common benefit requires, although the result will be the preferment of their own advantage over that of the minority. Acting in the exercise of their own rights, they are not accountable to those whom they bind by their action, though it may result in loss which might have been avoided by greater care and prudence. Above all while a trust is committed to a definite person or persons, the functions of representatives and represented in the majority rule are fluctuating and indeterminate, so that no one in particular can be regarded as trustee or as beneficiary.

§ 19. **The Personal Factor of the Bond of Association.**—In order to understand the nature of original representation, it is necessary to take into account the personal factor of the bond of

¹ Morawetz, *Private Corporations*, §§ 477, 529.

association, which coöperates with the objective factor of the common interest in shaping the controlling will. It produces a mutual psychological influence to which all the associates are subjected, and which has a tendency to neutralize individual divergencies of opinion and of will. If those who abstain from acting are bound by those who act, if the minority must yield to the majority, it is because in either case the bond of association manifests itself more powerfully in those who are accepted as representatives. On the other hand, the existence and common recognition of a personal bond gives to those whose voice is legally ineffectual a moral control over those who act, fortified by the possibility of a change of mutual position, so that they rise above the position of mere beneficiaries, a moral influence which is especially strong in the political community. The common bond strengthens the common interest by giving it a visible substratum and thus emphasizing its distinctness from the individual interests of any associate, and keeping the consciousness of its obligation alive. It also acts upon the holders of delegated powers by adding to the obligation of the trust the feeling of personal responsibility. A variety of circumstances may reveal the influence of this personal nexus, and the law may insist upon the presence of such circumstances as a condition of its recognizing the action of some of the associates as standing for the action of all. So action may proclaim itself as representative, and secure legal recognition as such, by outward marks of time, place, or form, indicating a reference to the bond of association. The representative character will be strengthened by giving all the associates an opportunity to coöperate in the formation of the collective will, so that the final decision clearly shows in which direction the bond has operated more strongly. Provisions as to notice and hearing, and manner of meeting, deliberation, and voting, give evidence of these various considerations, and find in them their rational explanation. Such fixed rules make it unnecessary to establish in every particular case

the representative quality of the act by tracing its connection with psychological influences springing from joint action. That the tracing of such connection is legally possible, is shown by the crime of conspiracy, where unlawful acts may be treated as representative without any recognized forms. The operation of the bond of association makes the recognition of representative action intelligible, and gives to an apparently arbitrary rule a psychological justification.

§ 20. **Effect of Representative Action:** (a) **The Element of Subjective Differentiation.**—The principle of original representation has the effect that some persons may by their acts dispose of rights belonging to others, or, in other words, that rights may be disposed of without proper legal acts on the part of those to whom they belong. It means, on the other hand, that acts done by a person which would normally affect his rights, may fail to have that effect as to rights held by him jointly with others. The resolution of a majority imposes obligations on the minority, and the deed of a shareholder purporting to convey an undivided share in corporate property is wholly ineffectual. The regular connection between the acts of a person and the liability resulting therefrom is broken through by the operation of the principle. The justification of this anomaly lies in the peculiar position of the preferred and subordinated or disregarded parties respectively: they are treated by the law exclusively with reference to a common relation sustained by them to each other and to a common purpose, and the force of their acts is determined according as they express more or less strongly the effect of the relation. The essential point is that what determines preference or exclusion is not specific personality, but the relative position of the person in the representation of an interest. It is not the question of A B C D against E and F, but the question of a majority against a minority, or the question of those acting under the common bond against those failing so to act. The principle of discrimination in the regulation of acts and their

effects is different from that followed in other forms of holding rights. The law does not connect the right with A or B or C absolutely or unqualifiedly, but only in so far as they remain within a certain sphere of interest and within the nexus of a certain association. This element, which is of fundamental importance in the conception of a corporation, may be designated as subjective differentiation.

This differentiation is far from being an unreal abstraction. We commonly judge and treat the acts of a person differently as he acts in different capacities. Since each act may be traced to different influences and surroundings, its effects can be placed accordingly, and the law can draw practical conclusions of the greatest importance from a division which has its root in differences of psychological operation. The subjective differentiation explains why a shareholder of a railroad company has no direct right of property in the rolling stock, the roadbed, the station houses, etc., of the road; he cannot use the cars at his pleasure, he can give no orders to the employees, and if he performs acts of ownership, he is a trespasser. The reason is that his property rights can be exercised only through the nexus of association, only in a meeting with his associates, and then only through the performance of certain functions in a certain manner, and with these qualifications none of the acts above specified would be possible. Acting in a meeting with his associates, the relative strength of position will determine the effect of his acts; his will may prevail or be defeated, according to a preponderance of concordance between the associates, but his will and action outside of this connection has no effect whatever.

§ 21. **Effect of Representative Action: (b) The Objective Determination of the Inherence of Rights.**—The element of differentiation is accompanied by another peculiar modification of the holding of rights, which indeed in some respects is only another aspect of the same process. From saying: the right does not belong to A generally, but to A only in a certain capacity, it is

only a short step to saying: the right belongs to the personal holder and representative of a certain interest, no matter whether this personal holder is A or B. We substitute in other words for a specific person a representative capacity, the right follows its object, *i. e.*, the interest, instead of its "subject," *i. e.*, the holder. We may therefore call this the objective determination of the inherence of rights, which forms another important element in the conception of a corporation.

It must be remembered how important it is to connect a right with some ascertainable person in order to identify it, and to secure it against other conflicting interests. The name of some individual person usually furnishes this means of identification, which we call the title, and a change of persons requires a transfer of title, which may be attended with inconvenience and difficulty. But through this process of objective determination, the means of identification is a certain interest embodied in concrete conditions, so that the title remains the same as long as the interest continues, regardless of the change of persons to whom the interest is secured; they become the indifferent and shifting actors of a character which is not affected by their individuality. This treatment is likewise based upon the practical consideration that an interest fixed by association is more powerful in determining the control of ways and means by which it is served, than the will and discretion of any specific individual. The same consideration may also demand that liabilities should shift with the shifting incidence of interest, rather than remain attached to a person irrespective of his relation to the interest, by which the act creating the liability was induced.

§ 22. **Other Applications of the Elements of Differentiation and Objective Determination.**—The elements of differentiation and objective determination are incident to representative action and therefore to the collective holding of rights; but they can also be discovered in other legal relations, to which aggregates of persons are not parties.

1. **Corporations Sole.**—The common law knows a species of corporations called corporations sole, consisting of only one person for the time being. King, bishop, and parson are the most conspicuous examples of this class. It is true that there is here a succession of several persons constituting the body corporate, but we cannot speak of an association and consequently we do not find the peculiar conditions which the associated holding of rights creates. In the case of the corporation sole it obviously cannot be the difficulty of concurrent action which demands an anomalous treatment, there is no necessity for original or delegated representation. The difference from an individual beneficial right lies here in the unity of title between the successive holders, so that property devolves from one to the other without formalities of transfer, *inter vivos* or *mortis causa*. In other words there is an objective determination of the inherence of the right; each successive holder appears merely as the representative of an interest more enduring than the term of his holding. Just as we regard each member of a corporation aggregate not in his individual capacity, but merely as one of a number of associates, so in the corporation sole the individual is merged in the abstract character of the temporary holder of a perpetual interest. Conceivably the same idea might have been extended to a succession of sole trustees or to a succession of individual officers holding title in their official name, as was actually done in the case of the Chamberlain of the City of London.¹ The idea of a corporation sole has on the whole been less acceptable than that of a corporation aggregate, probably because it is not called for by the same practical necessity. It is met with now and then in this country, but has so far not found any novel application.² The

¹ Kyd, I, p. 20.

² In Massachusetts by statute of 1786 ministers were made corporation sole to hold parsonage lands. (*Weston vs. Hunt*, 2 Mass. 500.) In Illinois under a private act the Catholic Bishop of Chicago forms a corporation sole, see 41 Ill., 148. In New York the court of appeals held that an individual banker could not organize as a corporation sole under the banking act. *Codd vs. Rathbone*, 19 N. Y., 37.

corporation sole was also unknown to the Roman law and is foreign to the systems based upon it.

2. **One Man Companies.**—We hear occasionally of one-man companies, corporations in which all the property is virtually held by a single individual. A person desires to engage a portion of his property in an enterprise and to limit his liabilities arising out of it to the funds so engaged. As the law does not allow him to do this outright, he uses the expedient of organizing a corporation with nominal and dependent shareholders, as required by law, by which his individual control is formally and outwardly covered. From a legal and technical point of view this is a perfect corporation, though perhaps a fraud upon the law and a fraud upon creditors.¹ If we regard substance rather than form, the arrangement simply shows that the principle of limitation of liability could be applied to individual as well as to joint undertakings. An individual trading with limited liability would not as such constitute even a corporation sole. The relation would borrow from the principles of corporate existence the separation of rights and obligations according to different spheres of interest within the same individual, *i. e.*, the element of differentiation, not that of objective determination of the inherence of rights. Proper safeguards analogous to corporate organization, would be necessary to mark and secure this differentiation and to prevent confusion and fraud; but the difficulty peculiar to corporate relations, that of securing undivided control, would not exist.

3. **Trust and Official Relations.**—The element of differentiation is necessarily recognized in every office and trust. As the office is a part of the corporate organization, this means that the process of differentiation is applied not merely to members, but also to holders of delegated powers. With reference to officers it

¹ In *Broderip vs. A. Solomon & Co. Limited* (11 Law Times Rep., 238) such a corporation was treated as agent and trustee for the individual, and thus substantial justice secured. The House of Lords has since, on appeal, upheld this method of incorporation as legitimate. See *London Times*, Nov. 17, 1896.

appears with particular clearness in those cases in which it has been held, that a corporate officer, when visiting a foreign jurisdiction on private business, does not carry his official character with him, and therefore cannot under such conditions be served with process.¹ Much of the law of officers and trustees is a development of the idea of differentiation of personality, although the principle is affected in both relations by so many peculiar modifications that the analogy to corporate membership is unsafe and misleading.

4. **Rights and Obligations attached to Property.**—The idea of objective determination is applied in many cases in which a right is attached, not to a definite individual, but to a certain sphere of interest represented by some property, and passes with that property as an appurtenance. Such is notably the case of easements or real servitudes and of covenants running with the land. Here the property and the interest attached to it is more permanent than the individuality of any holder. The understanding of the relation can be facilitated by personifying the dominant property and regarding it as the holder of the right, but this is of course a mere figure of speech, and the contention of some German jurists that the property here constitutes a juristic person, is a somewhat absurd extension of the idea of personality.² Analogous, and of great practical importance

¹ *St. Clair vs. Cox*, 106 U. S., 350, quoting *Newell vs. Great Western Ry. Co.*, 19 Mich., 349: Admitting that in given cases the foreign corporation would be bound by service on its treasurer in Michigan, this would only be so when the treasurer, the then official, the officer then in a manner impersonating the company, should be served. J. P. was not here as the treasurer of the defendants. He did not then represent them. His act in coming was not the act of the company, nor was his remaining the business or act of any besides himself. He had no principal, and he was no agent. He had no official status or representative character in this state.

² Jhering ridicules this in his "*Scherz und Ernst in der Jurisprudenz*," p. 12. "Do you see yonder old roof from which the rain water is dripping down upon the neighbor's ground? What do you take it to be?—An old roof.—True: But don't you see the halo of personality which illumines it with an electric glow? Let me tell you what it is: The old roof is a juristic person, for it is the holder of the right of stillicide."

is the connection of obligations with certain property as liens or encumbrances, so that they follow the property into whosoever hands it may pass. The element of objective determination means here the transfer of obligations without express release or assumption. A further peculiarity is added if the extent of the obligation is limited so that it can be enforced only out of the property which it follows. Taxes on land and under certain circumstances mortgages (the German "*Grundschild*") may have that character. Again, in this case, the principle of limitation of liability forms an additional analogy to corporate relations.

It thus appears that the characteristic elements which the collective holding of rights produces—differentiation and objective determination—are found under other names and in different forms, in other departments of the law.

III. THE AGGREGATE BODY.

§ 23. **Unity and Distinctiveness of the Association.**—If we correctly understand the qualified nature of the inherence of rights in the persons associated, the conception of the association follows easily as a simple sum of the rights so qualified. It has been shown how a member of a corporation can exercise corporate rights only within the nexus of association as one of many; applying this observation to all the members, it appears that individual exercise must be consolidated into collective exercise. It is the result of the principle of representation that harmonious action is eventually secured, notwithstanding the number and diversity of controlling persons, and that the combined resources are subjected to undivided control; and outwardly therefore the controlling will appears as a unit. It is natural to disregard the fact that the holders of the right are many, if the many act virtually as one, and their acting so is legally secured. The same is true if we regard passive instead of active capacity, and unity of status and of liability are naturally correlative to unity of action. This outward unity is expressed by a collective name and title, which stands for an aggregate, but an aggregate of similar component parts. The aggregate must partake of the nature of its constituent elements, and the elements being individuals qualified by subjective differentiation, the aggregate body must be qualified in like manner. The fact of association indeed aids the process of differentiation; it is very much easier to distinguish the acts of a person according to different capacities, where in one capacity he appears as only one of a large number, than where both capacities relate to his own person exclusively; for the presence or absence of personal connection is more easily traced than the mere connection with different interests. It is consequently not a legal refinement,

but a very common popular view, to distinguish between the individual rights and acts of a person and the rights and acts of an association of which he is a member. The larger the association, the clearer the difference becomes; for the member's interest as member is apt to be remote and insignificant as compared with his individual interests, and his individual power of control will be proportionately slight. To apply as a matter of course, and in all cases, facts and attributes, which the law recognizes with regard to the body, to each member individually, must lead to incorrect results, for the true meaning and understanding of facts is perverted and distorted if they are torn from their connection. The larger the body is, the more strongly this observation applies. The law expresses this view graphically by treating corporation and member as two absolutely different holders, and for all practical purposes only such treatment can do justice to the nature of the relation.

§ 24. **Different Corporations Composed of the Same Persons.**—

Since the corporation is a body embracing only qualified personalities, it follows that the same persons may be associated into different bodies corporate having different names and pursuing different purposes. Acting under one bond of association they hold certain rights and incur certain liabilities, acting under another bond these rights and liabilities do not affect them and leave the resources embraced under this latter bond untouched. Legal relations can under these circumstances exist between the two bodies without difficulty. Let us assume that a club as such is unable or does not desire to hold title to real estate. The members organize a stock company for the purpose of acquiring a club house, and between themselves subscribe to all the stock. Clearly, it cannot be said that the club owns its property, for the interests held by the same persons in the two capacities are entirely distinct. The club can enjoy the use of the property only as the tenant of the stock company; in such enjoyment the rights of the members are equal, but liable to be altogether

divested by expulsion from the club; the interests of the stockholders vary according to the amount of stock held by each, but each individual interest is indivestible. There is no legal guaranty that the managing officers of the two bodies will be or remain the same, it is far more likely that each will have from the beginning its distinct organization, and without special arrangements and repeated transfers of stock the membership of the two bodies will be sure to become different in course of time. Contractual relations can exist between the two bodies, and the club will probably hold a lease from the company. The distinctiveness of interests is sufficient to prevent legal confusion.

If, however, the club is incorporated and as a corporation owns its property, the social body and the property-holding body are one and the same, and not two separate bodies. The holding of the property is purely incidental and subservient to the social objects, and the social organization will in the last resort control all resources. Under these circumstances there can be no distinctiveness of rights and obligations. The ultimate test must be: is there such independence of interest and control that the acts of the one organization can under no circumstances legally affect the rights of the other? Unless there is such independence, the practical identity of power of control will prevent the effectual separation of rights and liabilities, and apart from that the separation of bodies has no meaning.¹

While different interests are apt to be pursued under different bonds of association, diversity of interests does not by itself prevent corporate identity. Should a trades union organized for common protection of trade interests branch out into coöperative enterprises yielding profit, or into charitable or social activity, without forming new organizations for these purposes, the identity of the body would be preserved, for the connecting

¹ For a different view applied to religious societies see *Petty vs. Tooker*, 21 N. Y., 267.

bond would remain the same, the continuity of personal nexus would be unbroken. All the varied interests would be subject to a common control and therefore would not be protected against each other. A distinct act of association, though by the same persons, for a new purpose, constitutes a different nexus, and creates a new corporation. The control of the new interest is then independent and cannot be impaired in behalf of the other interests.

The law may insist upon a distinct act of association for each distinct purpose and thus make a differentiation into separate bodies necessary. The law may however also allow the same body to pursue different interests, and at the same time guard against the confusion of these interests, by creating a separate trust for each, and compelling its faithful execution by the corporation. This is possible where the whole corporate organization partakes of the nature of a trust and the members are not intended to have exclusive control of the beneficial interest embodied in the corporate resources, so in case of municipal corporations, and—to a certain extent—of religious societies. Whether there are several distinct bodies or one body vested with distinct trusts must be determined from the legal provisions applicable to each case. In England many cities as such are constituted counties; the city and county of New York, comprising the same population and territory, are distinct corporations. The city of New York supports and manages its schools, but in many parts of the United States there are school districts which, while covering the same area as the town, are distinctly incorporated for school purposes, as the town is incorporated for municipal purposes. The distinction is somewhat refined but not meaningless. If there are two separate corporations they can contract with each other and sue each other; this is impossible where there is only one body with two different functions. The separate recognition of two bodies may also become essential for purposes of statutory or constitutional

construction. The law, in making provision for one body, may contemplate only the one set of purposes and may intend to leave the other untouched. Suppose the Legislature were prevented by constitutional inhibition from special legislation affecting cities, the right of such legislation might still be open as to the county, though coextensive in territory and population. The distinction would probably be legitimate, though cases can be imagined where it might be used as a cloak for an evasion of the constitutional provision. And so as to limitation of indebtedness.¹ In all such cases the differentiation is based upon a substantial diversity of functions, which is accompanied by difference in powers and in organization.

§ 25. **Differentiation and Citizenship under the Decisions of the Federal Courts.**—The conception of differentiation assumes a peculiar form in the doctrines of the Federal courts regarding the citizenship of corporations, for purposes of jurisdiction. If the same corporators, owning the same property and managing it as a unit through the same board of directors, are organized under charters of two different states, it is held that although the incorporating statute of each state contemplates, and intends to effect, a merger and consolidation into one company, yet there are two distinct corporations in the two states, for the law of one state has no operation in the other. The idea of differentiation properly understood would be inapplicable to such a case, for there is unity of membership, of organization, of purpose, and of property; but there is no difficulty in assuming the same corporation to constitute two entirely separate entities, if we proceed

¹ The New York Constitution provided that no county containing a city of over 100,000 inhabitants, or any such city, should become indebted beyond a certain amount. It was held in *Adams vs. East River Savings Institution*, 136 N.Y., 52, that bonds issued by the county of Kings were valid, though if they were added to the debts of the city of Brooklyn, the aggregate indebtedness would exceed the constitutional limit. City and county, though substantially the same, were here treated as distinct legal entities. The decision would probably be the same in a case arising now that the city of Brooklyn has been made coextensive with the county of Kings.

upon the theory of a purely fictitious personality which rests solely upon the *fiat* of the law and may be dissociated from its natural and concrete foundations.¹ As was said in *Ohio & Mississippi R. R. Co. vs. Wheeler*, 1 Black, 286, 297: "It is true that a corporation by the name of the plaintiff appears to have been chartered by the states of Indiana and Ohio, clothed with the same capacities and powers and intended to accomplish the same objects, and it is spoken of in the laws of those states as one corporate body exercising the same powers and fulfilling the same duties in both states. Yet it has no legal existence in either state except by the law of the state, and neither state could confer on it a corporate existence in the other nor add or diminish the powers to be therein exercised. It may indeed be composed of and represent under the corporate name the same natural persons. But the legal entity or person which exists by force of law can have no existence beyond the limits of the state or sovereignty which brought it into life and endues it with its faculties and powers. The President and Directors of the O. & M. R. R. Co. are therefore a distinct and separate body in Indiana from the corporate body of the same name in Ohio."

It is held upon this view that, *e. g.*, a corporation of Indiana also incorporated in Kentucky may in Kentucky invoke the jurisdiction of the Federal courts as being an Indiana corporation.² It should be noted that it is not merely asserted that the same corporation may have a double citizenship as it may have a double domicile,—upon this view alone it might be difficult to hold that the corporation may ignore its citizenship in the state in which it sues or is sued,—but that there are two distinct corporations in the two states, though the property rights held in both may be practically indistinguishable. The effort of the Federal courts to maintain the jurisdiction

¹ *Muller vs. Dows*, 94 U. S., 444; *Graham vs. Boston, Hartford & Erie R. R. Co.*, 118 U. S., 161; *Nashua R. R. vs. Lowell R. R.*, 136 U. S., 356.

² *Louisville Trust Co. vs. Louisville, N. A. & C. R. R. Co.*, 75 Fed. Rep., 433.

based on adverse citizenship has been responsible for some peculiar law, and the theory of fictitious and artificial personality lends itself to any arbitrary determination of the status of corporations that may be desired.¹

§ 26. **Identity in Succession.**— The aggregate body also partakes of the nature of its constituent elements in being affected by what I have called the objective determination of the inherence of rights. The individual members being primarily the representatives of an interest which is the same for all, are in law and fact assimilated to each other; the effect of the bond of association is, if such a term may be used, a process of indifferenciation with respect to the members. Hence the corporate name signifies the objective element of a certain relation and not particular individuals. Hence, also, individual members may change without a change of title. That is to say, rights and liabilities become vested and divested by the mere act of joining or leaving the association and the pursuit of the common interest under it, and practically this change is covered by the common name and by the continuity of the tie binding remaining and incoming members together. The common law designates this important attribute of the body corporate as perpetuity of succession; identity in succession, *i. e.*, in a succession of changing members would, perhaps, be the better term. The right still belongs to a definitely circumscribed set of persons, and the personal element is not lost in an abstract interest such as a charitable trust represents. But the personal reference is defined by association and not by individuality; the holders of the right can be ascertained by following the tie of association which at different times may bind different individuals together. The continuity of the personal nexus is therefore an essential feature in determining the identity of the body corporate, while in a trust the impersonal element of trust fund and objects furnishes the means of identification.

¹ A slight reaction from these doctrines appears in *St. Louis & San Francisco R. R. Co. vs. James*, 161 U. S., 545.

§ 27. **The Resulting Conception of the Body Corporate. Departure from Principles of Individual Right.**—In this way we obtain the salient characteristics of the body corporate: its unity, its distinctiveness, and its identity in succession; all flowing indirectly from the principle of representative action, which qualifies and transforms the value and the meaning of the personal factor in the holding and the exercise of rights. It should be clearly recognized that in the principle of original representation is involved a highly important and radical difference from rules of law commonly accepted as elementary. The law ordinarily regards the whole complex of rights of an individual as subject to his disposition and as subject to the disposition of no one else; conversely this complex is in its entirety available for the satisfaction of his liabilities, and for those of no one else. In this latter application the significance of the rule must be found, as a principle based upon ideas of justice and equity. That each person should fully answer for all his acts, and should not answer for the acts of others, is indeed a maxim of extraordinary importance, and it seems to be violated in the admission of representative action not resting upon express delegation. Against this it can only be urged that the maxim without modification is unjustifiable, because it antagonizes or prevents the full protection of joint interests, which, as we have seen, demand representation. The foundation of all liability upon principles of moral responsibility is a legal conception which may be carried to excessive lengths; even if fully justified where liability is penal and the moral quality of the act is of the essence of its legal aspect, it may be inadequate where it is simply a question of adjusting conflicting interests in accordance with prevailing ideas of justice and equity. Not only therefore may this principle be modified in other directions, as, *e. g.*, under those systems which begin to recognize liability for accident; but its modification with respect to the joint rights of large bodies is an essential condition of their full and efficient recognition. Under such

extension of principles of liability a person may be affected in some sphere of his interests as the legal consequence of acts not properly his own, and the acts of a person may be without any effect upon interests of his which are not under his exclusive control, although intended, and, were they his own exclusively, sufficient, to affect them. This results from the process of differentiation by which the acts of a person are given effect or ignored, and their incidence is determined, with sole regard to the position of that person towards a certain nexus of association, in doing the acts in question.

§ 28. **Theoretical Difficulties.**—We can well understand that the recognition of a form of holding rights involving such a departure from well-settled principles must have met with considerable difficulty. Our ideas of a right have developed from its most common form, the coincidence of control and interest in one person, as we find it in property and liberty. It is the form of right preëminent in private law, and therefore juristic thought is most conversant with it. It is the only form of right which the Roman jurists fully developed, and the canons of the Roman law have been accepted in later times as embodying written reason. If the individual, private, and beneficial right is to measure and govern all rules relating to rights of whatsoever nature, then the corporate right will continue to be abnormal and illogical. If, on the other hand, we emancipate ourselves from the absolute recognition of one form of right as orthodox, if we admit that the incidents of a right may vary according to the difference of interests for the protection of which it exists, and according to the difference of conditions under which that protection must operate, we may well arrive at the conclusion, that in dealing with associations of persons we must modify the ideas which we have derived from the right of property in individuals, and what has first seemed to be an anomaly will appear simply as another but equally legitimate form of development.

§ 29. Solution of the Difficulty Offered by the Organic Theory.

—The prevailing theories of corporate existence recognize what I have called the orthodox view of the nature of the right, and must consequently dispose in some way of the difficulty presented by the incidents of collective holding. The fiction theory creates an artificial unit and asks us to accept it in place of the required personal holder. But if the nature of the right, for psychological and moral reasons, demands that it be vested in a person, it is manifest that a fictitious person will not do. The fiction theory therefore leaves the difficulty where it is. Its positive fruit is the satisfaction of a technical requirement; and that it burdens with the specter of an imaginary person which may claim all power and disclaim all liability.

The attitude of those who attribute to the corporation, not a fictitious, but a true and real personality of its own, is quite different. These jurists too regard undivided personal volition as essential to the holding of a right; they too are consequently confronted with the necessity of finding somewhere a unity of will in the many persons associated. But they see that we are not helped in any way by assuming a unit which we admit at the same time to be unreal; what they offer they consequently present as a philosophical reality. They insist that the association of many persons produces a volition of a higher order which governs the common right; that while this aggregate will manifests itself through individuals, yet these individuals are merely organs of the aggregate personality, inspired by its consciousness, its purpose, and its will. Corresponding to the aggregate will and consciousness there is the possibility of aggregate knowledge, ignorance, error, good and bad faith, and wrongdoing; in other words, the elements by which we judge the nature of individual acts and their consequences in law, are applicable by analogy to associations of human beings. For evidence of such aggregate personality we are referred to the existence of nations and other communities which manifest their individuality by specific types

of character, by the creation of distinctive customs and institutions, law, literature, and language, and by the unity of their action in history.

§ 30. **Objections to the Organic Theory.**—It is quite possible to admit the distinctive individuality of collective bodies under certain circumstances, without accepting it as the solution of the problem of corporate rights. Where the connection between the persons is very close, they may be psychologically affected to such an extent as to develop identical modes of thinking and feeling, identical phenomena of volition and forms of action, which can be readily distinguished from the thought, feeling, volition, and action of each taken separately, and be consequently attributable to the aggregate as such. This will happen, where the connection is physically close, where the many are assembled in one place and under the influence of outward agencies brought to bear upon all at the same time (*"ut per multa corpora in uno loco congregata sequatur et unica voluntas"*¹), so that a deliberative body, a house of legislature, a mass meeting or a mob, may well exhibit distinctive psychological phenomena somewhat analogous to those of a physical person; — or else where the connection between the many persons lies at many points and in many relations of life, and extends through long periods of time, so that the constancy and variety of common influences and impressions make up for the lack of physical closeness of association; upon this is based the specific and distinctive nature of the nation, of communities tied together by common blood, descent, traditions, history, language, and common territory. But the collective holding of rights is not dependent upon associations of such strongly marked cohesion. The people of the United States have perhaps the individuality of a nation, they certainly have it to a much more marked degree than the people of the State of New York, but as to their holding of rights both stand exactly alike, while neither New

¹ Preamble to the Gild statutes of Berwick. See Gross, the Gild Merchant, I, p. 211.

Englanders nor Southerners as such can be parties to any legal relation.

A family with strong elements of cohesion is without corporate will, while a stock company without any noticeable psychological connection between the members may easily exercise common rights. Those elements therefore which produce the impression of a distinctive aggregate personality most strongly, may be perfectly irrelevant with regard to the collective holding of rights. Such holding should therefore not depend upon these elements for an explanation of its possibility and its nature. They are more valuable for sociological and psychological than for legal purposes.

It is furthermore true that the operation of the bond of association or its absence can be traced in many individual acts, and that we may be able accordingly to say that under given circumstances a community as such is guilty of an offense, that the corporation as such has notice of a fact, or that notice has been given to individuals in such a manner that it does not affect them as members or organs of the corporation. In such cases it is also extremely convenient and helpful to operate with the notion of corporate personality, and there is no danger in this as long as we remember that the bond of association operates only upon and through individuals placed in a certain position. But the organic theory certainly awakens and encourages the impression that this corporate personality possesses an absolute unity and distinctiveness which if properly understood would enable us to decide correctly all questions of corporate rights and acts, to mark with certainty and exactness the limits of corporate existence, corporate representation, and corporate powers. This certainty is quite illusory, and it is a grave objection to the organic theory that it tends to raise a belief in it. The theory promises more than it can perform. By tracing the psychological influence of a common bond upon individuals we accomplish all that is in reality accomplished by the assumption of a

will and personality of a higher order, without dealing with undemonstrable entities, and without being liable to unwarranted and fallacious conclusions. It will also be shown that in most cases in which we speak of an act or an attribute as corporate, it is not corporate in the psychologically collective sense, but merely representative, and imputed to the corporation for reasons of policy and convenience.

§ 31. **The Problem of Corporate Will.**—If we discard the conception of the aggregate person as a new and distinct species of humanity, it becomes necessary to analyze more closely ideas which are habitually applied to corporations in analogy to the attributes of individuals, such as corporate will, corporate acting capacity, etc.

And first as to corporate will. In its simplest and most obvious meaning this is the personal will of the associates acting under the bond of association. This will is the product of mutual personal influence and of the influence of a common purpose, frequently also the result of compromise and submission. Where under the operation of these factors we obtain a unanimous resolution, we may clearly speak of corporate will. But we are also justified in assuming a correct expression of corporate will, where of the associated persons only a portion, representative in numbers, character, and position, act habitually, while the rest sustain a relation of acquiescence, dependence, or incapacity. A unanimous expression of the adult male members of a political community may therefore be accepted as embodying the aggregate will.

It may even be urged that where a majority is clearly guided by the common interest, while the position of the minority is dictated by the expectation of adverse individual benefit, the corporate will is represented by the majority act as springing from motives which should in reason prompt and determine all the members, while the dissenting members place themselves beyond the corporate bond and do not disturb the psychological

correctness of the aggregate conclusion. This view must necessarily be taken, where corporation and member are opposed to each other as adverse parties, either in matters of internal government, or in contract or tort. The adverse interest of the member precludes him from representing the corporate will.¹

The situation is different where both majority and minority represent corporate interests, and it is simply a question of judgment and expediency, which of two or more courses shall be adopted. The true corporate will would be expressed by unanimous action resulting from common deliberation and mutual compromise and submission; but for purposes of convenience the law stops the process of reaching this conclusion halfway, and is satisfied with the concurrence of the greater portion of those acting. The justification of this legal expedient lies in the fact that the will of the majority may be presumed to express correctly what would be the result of forced unanimity; a presumption not always agreeable to fact, but convenient and more practicable than any other. A similar and even stronger presumption operates in favor of the will of the quorum against those voluntarily abstaining from action. In so far as the presumption fails to be correct, it cannot be denied that a will which is not identical with the corporate will is imputed to the corporation, just as we impute the will of the agent to the principal without insisting that it should in all cases accord with the principal's will. The same view must be taken of the acts of other corporate organs; they may likewise be presumed to voice correctly the corporate will, but their will is not the corporate will strictly speaking. There too the imputation of the act to the corporation is justified, because the will of the organ is largely determined by the operation of the bond of association upon his mind, because the consciousness of personal influence

¹ So, of course, no valid service of process upon a corporation can be had by serving the papers upon one of its officers who is himself plaintiff in the action. *George vs. American Ginning Co.*, 32 L. R. A., 764.

and responsibility is similar to that working upon the associates. The policy of the law results, however, in the substitution of a will presumptively according with the corporate will for the will which is actually and undoubtedly corporate.

There is some ground for arguing that the correct expression of corporate will depends upon joint meeting and deliberation of the associates. On the other hand, it is certain that the presumption of accordance with corporate will is as strong where all the associates act separately, as where only a portion act jointly. It is, however, a well-settled rule, that while official boards which exercise powers collectively may act by quorum and majority, they must act in joint meeting.¹ Evidently this rule aims to secure an additional guaranty that the will expressed shall be truly corporate, while actual concurrence of all members is waived in the interest of the more expeditious transaction of public business. Where the public will is expressed by ballot each citizen acts separately; but the constant contact between members of a political community is a sufficient substitute for joint meeting. Where the members of a corporation are the sole and ultimate parties in interest, their unanimous separate action is substantially equivalent to corporate action. As was said in the case of the *People vs. North River Sugar Refining Company*, 121 N. Y., 582, p. 619, "There may be actual corporate conduct which is not formal corporate action, and where that conduct is directed and produced by the whole body, both of officers and stockholders, by every living instrumentality which can possess and wield the corporate franchise, that conduct is of corporate character."² In equity the corporation can often be practically bound by the aid of the doctrine of estoppel or by recognizing equitable as against legal rights.³ Where legal requirements as to manner of action are disregarded, a formal

¹ *McCortle vs. Bates*, 29 Oh. St., 419. See *Mechem on Public Officers*, § 577.

² See also *State vs. Standard Oil Co.*, 49 Oh. St., 137.

³ *Swift vs. Smith*, 65 Md., 428.

defect will undoubtedly result, and the act may be void. The cases which refuse to regard all the shareholders (or the individual holding all the stock) as identical with the corporation, mean simply that where rights are held under corporate organization, the law will insist upon all legal acts being done in the corporate name and not in the name of individual members.¹ This is sound legal policy, for the security of transactions would be seriously impaired if a legally established name could be disregarded *ad libitum*.

§ 32. **Corporate Acting Capacity.**—Closely connected with the question of corporate will is that of acting capacity. An act to be recognized as truly corporate should unmistakably bear the impress of collective will and impulse. In this sense truly corporate is the act of acclamation, a form of action which can be used only for simple declarations (elections, approval, etc.). It would be difficult to imagine another act as specifically corporate and collective as this; the nearest equivalent is an act done by all the members acting as nearly together as possible in place and in time.² It is clear that if we restrict corporate acts to this, the range of corporate acting capacity must be extremely limited; for an act of delivery by any considerable number of persons must be a physical impossibility.

But it is not necessary to take such a narrow view, for only in the fewest cases is it necessary that a person's legal act should also be his physical act. It is usually sufficient that the act should be set in motion directly by his will, no matter whose physical organs are used.³ There seems to be no reason why

¹ *Wheelock vs. Moulton*, 15 Vt., 385. *Button vs. Hoffman*, 61 Wis., 20.

² Professor Gierke cites some curious instances illustrating the effort to stamp certain acts as collective. So he mentions a local custom by which, in executing a sentence of death, all the members of the community were required to touch the rope by which the culprit was hanged. (*Genossenschaftsrecht*, II., p. 402.)

³ So the law intends the execution of a will to be the testator's personal act, yet a signature by some other person in his presence and by his express direction is sufficient. (Stat. of Frauds, § 12.)

the same liberal view should not be applied to the acts of corporations. There are indeed some acts the nature of which seems to exclude the idea of vicarious performance. Of this character is perhaps an oath; for it may be urged that the sense of solemnity and responsibility is lost if it is not taken directly by the person whose conscience is sought to be bound. There are some crimes to which similar observations apply, and as a rule it will be impossible to establish with clearness the psychological connection between the criminal intent of the physical perpetrator of the criminal act and the will of a body of persons; for criminal intent is usually not manifested by formal and deliberate declarations. The idea of a collective crime appears, however in the law regarding mobs and conspiracies.

On principle it should be said that every act is a corporate act which is directly induced by an expression of true corporate will, as, *e. g.*, by an unanimous resolution. Understood in this liberal sense corporate acting capacity is coextensive with the possibility of corporate will. As a matter of fact, however, courts have rarely to deal with acts which are even in this liberal sense corporate. What proclaims itself as a corporate act is nearly always an act based upon representative will, *i. e.*, an act induced by a will which is imputed to the corporation on account of presumptive and probable identity and accordance with what would be actual corporate will. Representative will naturally produces only representative action, and the law does not require more than that in order to bind the corporation. When we speak of corporate acting capacity we have in mind the possibility to be represented in action and not the mere capacity to give effect to corporate will, and a corporate act therefore becomes simply an act dictated by proper corporate representation.

§ 33. **Representative Action and Organization.**—Of the two methods of representative action, original representation, *i. e.*, the act of the quorum or of a majority, can directly produce at

most a declaration of will ; for all more complicated acts, even for the execution of instruments, individual agency becomes necessary. For the vast majority of its legal acts the corporation must therefore depend upon the additional aid of delegated representation ; and the delegation of powers, which is the chief purpose of organization, is therefore the regular basis of corporate acting capacity.

The organization of the body corporate, which distributes different functions among different organs, constitutes an advance upon inherent and natural modes of representation. It may even depart from them directly, in so far as powers may be delegated to persons who are not associates, the express delegation standing in stead of a share in the original right. When distinct organs have been created, it is not necessary in each case to ask whether the personal nexus of the association is apparent in the act of those acting on behalf of the corporation, so as to make their action representative. It follows from this mode of representation, that a person who is especially entrusted with a set of functions will be apt to assume a habit of mind which is most appropriate for the exercise of these functions in the corporate interest, and the law strengthens this advantage by forbidding him to take a position adverse to his trust. It is also possible through proper organization to give separate expression to separate interests of the same body, and thus to produce a proper balance and adjustment of the conflict of purposes which may arise in an association of many spheres of action. This constitutes the great value of organization in public law, as a means of protecting private rights against governmental action through the machinery of the government itself.

While organization thus bestows upon the corporation great facilities for action, it carries corresponding burdens. As the corporation must constantly claim the benefit of acts done by its organs, it cannot fail to be charged with their acts done in its apparent interest and with the aid of resources placed in their

hands. It is inevitable that representative acting capacity should appear to the popular mind as coextensive with the possibilities of corporate will.

§ 34. **The Governing Body.**—It is in accordance with this view that in every corporation there is commonly recognized some one organ as holding what we may call residuary powers, whose acts are taken as *prima facie* representative within the whole range of corporate acting capacity. Where the body is accustomed to act directly by original representation, this organ may be found in the quorum and the majority; in most cases, however, it will be a delegated organ, itself consisting of a number of persons, and designated as governing board or body. Of this nature is the managing board of directors or trustees in a private, the legislative body or bodies in a public, corporation.

The plan of organization not unfrequently provides that the whole of the corporate powers shall be vested in the governing body or board. An interesting question then arises as to the relation between this body and the members at large of the corporation: is the relation that of agent and principal or not? Both views have found judicial support. It has been held on the one side that the directors are the primary possessors of all the powers which the charter confers; that since in the board of directors is vested every power, faculty or function which belongs to the body they represent, there can be no question in the law of agency;¹ on the other side it has been said that the directors are the mere representatives of the corporations, the latter constituting the corporation.² In favor of the latter view it may be said that the directors are elected by the members and that the election constitutes a delegation of powers; in favor of the former that, since the organization is

¹ Hoyt *vs.* Thompson, 19 N. Y., 207.

² Bissell *vs.* Michigan Southern R. R. Co., 22 N. Y., 258, 267, 296. *Mechanics' Bank vs. N. Y. & N. H. R. R. Co.*, 13 N. Y., 599, 640. *Brokaw vs. N. J. R. R. Co.*, 32 N. J. L., p. 332. (Also see 121 N. Y., 620.)

generally prescribed by law, the election is only the designation of those organs in whom the law itself vests the entirety of corporate powers.

But whether we hold the corporate powers to be delegated by the corporators or to be vested by law, the position of the governing body must be different from that of mere agents. While the agent's authority can as a rule be revoked by the principal at any time, the authority of the governing body cannot be superseded by majority resolutions.¹ This follows, however, from the general nature of corporate acting capacity. The majority will is only presumptively identical with the corporate will, and a similar presumption exists in favor of the will of the governing body. It is the proper function of the plan of organization to decide between the two presumptions if they conflict; and by vesting the corporate powers in the governing body for a definite time it sets the will of the latter above that of fluctuating majorities. Logically, however, the unanimous will of all the associates should bind the corporation, *i. e.*, the real should prevail over the presumptive corporate will. The treatment of irregular acts of the governing body as merely voidable, and the possibility of their ratification by unanimous consent or acquiescence, must be based upon a view of the relations between governing body and corporators analogous to that between agent and principal.

Where the whole sum of corporate powers is vested by law directly in a board of directors or trustees,—leaving to the members nothing but a right of election,—it may be very plausibly urged that the corporate rights are held substantially as a trust for the corporators, who then appear simply as beneficiaries. The problem of corporate capacity would thereby be shifted from the members at large to the governing body, which holds and exercises its trust upon the collective principle, by original and delegated representation. Such an organization

¹ Morawetz, *Private Corporations*, §§ 243, 511.

reduces the personal cohesion between the corporators to a minimum, and allows us to see in a large railroad, banking or insurance corporation rather an aggregation of capital than an association of persons. Still there is this distinction from a pure trust, that the holding of a right in which the parties in interest elect those who exercise the control, furnishes a higher degree of protection to the joint interest; and this the law recognizes by vesting the title in the members collectively. Through frequent elections a very substantial measure of indirect control can be secured to the members, even where the whole of the corporate powers is vested in the governing board. It is true that a trust can be organized for the protection of joint interests in such a manner that the parties in interest elect the trustees; in that case the distinction from corporate organization in which the governing body holds all corporate powers is merely nominal and technical. Such an arrangement is apt to be adopted where there are difficulties in the way of corporate organization; otherwise the creation of a trust is more appropriate where the beneficiaries are incapable of acting or are not intended to have a vested interest in the corporate funds; so where property is held for charitable purposes. It should also be observed that where the law vests the corporate powers in a board of directors, this has been construed in some jurisdictions to refer only to ordinary acts of management, so that the exercise of exceptional powers is reserved by implication to the body of the corporators;² this of course is likewise based upon the view that the members at large are the true and ultimate holders of the corporate rights.

§ 35. **Representation in Fact and in Law.**—Some of the most difficult questions regarding corporate capacity, notably those concerning the treatment of *ultra vires* and wrongful acts, arise from conflicting claims as to representation. It is impossible to form a clear conception of the nature of these difficulties, unless

² *R. R. Co. vs. Allerton*, 18 Wall 233, *Eidman vs. Bowman*, 58 Ill., 444.

we distinguish between the psychological and the legal aspect of representation. The fact that a corporation acts habitually by representation must operate to its detriment as well as to its benefit. The creation of representative functions will inevitably convey to those dealing with the corporation the idea of representative position and power, corresponding to such functions and commensurate with the whole range of collective acting capacity; the corporation will be popularly held to possess organs for the performance of all acts which it might conceivably authorize. If the psychological possibilities of the bond of association are allowed full scope, the domain of corporate will is coextensive with the domain of possible corporate interest, and therefore may easily expand beyond the original purposes of association. Its only intrinsic limit is the consciousness of collective ends and purposes; for the continuing operation of the personal nexus depends upon some ostensible reference of corporate resources to the joint interests of all members. But while corporate action must manifest a possible tendency to inure in some degree to the benefit of each member, such benefit may easily be offset by a much greater injury to the member's individual non-corporate interests. The danger of such conflict is inseparable from any association. In joining an association the members will therefore stipulate for a limitation of purposes, beyond which the risk of such conflict is not to be incurred. But the psychological possibility of corporate action is not thereby destroyed; it becomes simply a question between usurped corporate power and invaded individual right, which may be variously decided. The actual power and the legal right of representation may thus go very far apart; the reality of aggregate conditions involves the possibility of their asserting themselves in the face of legal restrictions.

§ 36. **Ultra Vires Acts.**—We speak of "*ultra vires*" where a corporation acts beyond the limits of the powers established by its constitution as embodied in charter or articles of association

or general law. They are not merely irregular in form or done by unauthorized organs, but acts which the corporation could not legally do in any manner without having first its constituent act changed. Such an act may constitute a violation of other rights in two different directions; as against the associates who do not concur in it it is a breach of contract or trust; as against the state it is the breach of a limitation imposed upon the body corporate as a prerequisite to its legal recognition. There is thus a double barrier opposed to the legality of these acts, and one may stand even where the other is removed by waiver, consent, or ratification.

There is considerable lack of principle and consistency in the judicial treatment of these acts, and this is probably due to faulty views of the nature of corporate acting capacity. If we regard the principle of representation purely as a creature of the law, having no possible existence apart from legal recognition, there is no escape from the conclusion that all corporate acting capacity involving that principle must be strictly bound within legal limits, which, in the nature of things, it cannot exceed. An *ultra vires* act cannot, therefore, possibly be a corporate act, and a corporate act cannot be an *ultra vires* act; the two ideas involve a *contradictio in adjecto*. Upon this basis we must take one of two alternative positions:

Either we hold that the law by the creation of the corporation bestows upon it the fullest acting capacity, while at the same time it forbids its use beyond the limits of the charter powers. This is a possible and a workable theory; it is supported by some writers as the "general capacity" doctrine. If we accept it, every act done by corporate authorities in the corporate name is a corporate act by legal creation and legal sanction. It is perhaps not impossible that such an act should at the same time be wrongful, illegal, and even voidable, but it does seem illogical to treat it as void. For if it is void, the law creates only in order to deny its creation, it gives with one hand and takes

with the other. A void corporate act, which, in order to be a corporate act, must first have been called into existence by the *fiat* of the law, is necessarily an anomaly. The fiction theory and the general-capacity doctrine thus become irreconcilable, unless we are ready to admit that no corporate act, however much beyond the corporate purposes, should ever be treated as void. But this admission would find no support in the decisions of the courts.

Or, arguing still on the basis of the fiction theory, we may hold that the law confers acting capacity only to a limited extent, as an aid and instrument to the accomplishment of the charter purposes. Upon this view every act beyond the corporate powers is simply the act of physical persons attempting to attach to the corporation rights or liabilities which it has not acquired or assumed. This, on the whole, is the more plausible view under the fiction theory, and logically it should dispose of *ultra vires* acts by denying their possibility. It is, however, well known that practically no such simple solution of the problem is possible, and that persistently *ultra vires* acts enforce their recognition as corporate acts.

§ 37. **Ultra Vires Acts as Corporate Acts.**—But if we regard corporate acting capacity as the expression of the principle of representation, and the principle of representation as the product of associated action, irrespective of law, then it follows that the law by recognizing the corporation as such does not create its acting capacity, but merely admits the natural effect of the collective holding of rights together with its inevitable incidents. The recognition of an *ultra vires* act as a corporate act, therefore, does not involve a logical inconsistency, nor does it pre-judge the question of its legality or validity. This view leads to a distinction between corporate acting capacity and corporate powers or legal capacity, and while we may admit the former to the fullest extent, we may yet hold that the law in recognizing a corporation grants to it only the powers required for the accomplishment of its charter purposes.

Where, therefore, an act is done in the corporate name, but beyond the corporate powers, it should first be determined whether the act can morally or psychologically be attributed to the body corporate as truly representative in character. The test must be twofold: first, is the act done in the corporate interest, *i. e.*, for the real or plausible advancement of common purposes? and second: is it done by organs whose position is for the doing of this kind of acts representative? It would be probably difficult to discover any *ultra vires* act with which the courts ever had to deal, which was not corporate upon both the tests advanced, because without their presence as a justification it would probably not be attempted to fasten an act upon a corporation. If a railroad company runs a steamboat,¹ if a manufacturing company builds houses and rents them to its employees, if a business corporation subscribes money to secure the location of a public building near its premises,² even where a railroad company guarantees the expenses of a musical festival which promises to attract many visitors to a city,³ the common interest is obvious. Take the extreme case of a city running a distillery.⁴ A municipal corporation is organized for government, but incidental to government is the possession of property, and the possession of property requires its profitable use and investment. What shall constitute a proper investment—loan on security, holding of real estate, or industrial enterprise—is a matter of policy, and if it is contended that industrial activity is not properly investment, it may be answered that the foreclosure of a mortgage may lead to it as a practical necessity. If, however, such connection with common purposes cannot be established, the act cannot be called corporate in any sense: so if a bank cashier should pay an individual debt with moneys

¹ Colman *vs.* Eastern Counties Ry. Co., 10, Beav. 1.

² B. S. Green Co. *vs.* Blodgett, 42. N. E., 176.

³ Davis *vs.* Old Colony Ry. Co., 131 Mass., 258.

⁴ Salt Lake City *vs.* Hollister, 118 U. S., 256.

belonging to the bank, it would be simply a conversion of corporate funds, and no one would speak of an *ultra vires* act. And so the *ultra vires* act, in order to be corporate, must be done by an officer whose position for that purpose is representative; if a freight agent had guaranteed the expenses of a musical festival, his act would never have been attempted to be imputed to the railroad company, but the act of a freight agent in taking goods for transportation beyond the line of his company, though it may be *ultra vires*, may yet be corporate. As a rule, however, *ultra vires* acts must be either done or authorized by governing boards, or general managing officers, whose acts, upon principles above set forth, are *prima facie* representative.

§ 38. **Treatment of Ultra Vires Acts.**—The recognition of an *ultra vires* act as corporate is quite consistent with the view that it is an act which is illegal as violating shareholders' rights or legal restrictions or both. Upon the ground of mere illegality, however, different methods of legal treatment are possible.

First: an illegal act may in law be treated as void, *i. e.*, it may be deprived of its intended effect. This is especially possible where the act, in order to be effectual, requires legal enforcement, of which a broken executory contract is the typical example. Any unconsummated act, the consummation of which can be prevented by judicial decree, as, *e. g.*, a resolution, an order, or any documentary declaration, stands upon the same footing. If such an act is void, a defense raised by anybody, or an appropriate action brought by anyone having an actionable interest, will result in a judicial declaration of nullity, which, however, adds nothing to the legal nullity of the act. If the act is executed and consummated by transfer of possession or otherwise, the legal view may still on principle be the same, there may be complete failure of title or failure of consideration, but the law cannot prevent actual conditions from having their natural effect, and the result must be in many cases confusion or injustice or both. Such a state of facts may then again be

counteracted by appropriate remedies, the purpose of which will be to restore the parties to their equitable rights. "The courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as it could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back, or compensation to be made for it."¹

Second: The law may treat the *ultra vires* act as simply wrongful and not as void. In purely executory acts the result will often be the same, since the prevention of a wrongful act or a successful defense to it while in this stage, will leave it altogether without effect. There will be this difference, however, that the wrongfulness could not be taken advantage of by parties whose rights are not violated. Where therefore the performance of an *ultra vires* contract is successfully resisted either by the corporation making it or by the other contracting party, it is clear that the contract is treated as void and not as simply wrongful. Where, however, *ultra vires* acts are fully executed, the law in most cases practically proceeds upon the view that the act is merely wrongful. This may still give to the aggrieved party a right in equity to demand rescission or cancellation or an injunction restraining the enjoyment of the rights held wrongfully, or it may result in the recognition of the *ultra vires* act as having its full intended effect, throwing the aggrieved party back upon other remedies. So the injured corporation may sue the directors for damages, and above all the state may institute proceedings against the corporation violating its charter for a forfeiture of its franchises or for its dissolution, proceedings which cannot effect a confiscation of the beneficial interest in the fruits of the *ultra vires* acts. Such proceedings are of course based upon the theory that the acts complained of, while *ultra vires* and illegal, must be attributed to the corporation.

¹ Central Transportation Co. vs. Pullman Palace Car Co., 139 U.S., 24.

Whether *ultra vires* acts shall be treated as void or as wrongful, is a question of legal policy, which is not affected by any theory of corporate existence. It is simply a part of the larger question how, in general, acts beyond legal power or violating legal prohibitions shall be dealt with—one of the most difficult and unsettled legal problems. The position of the law may vary according as the act is simply beyond the charter power, or also against public policy, immoral, or expressly prohibited, also according as the corporation is public or private. The decision therefore turns on other points than the nature of corporate acting capacity.

§ 39. **Corporate Torts.**—If corporate acting capacity is purely a gift of the law, it is as difficult to understand a corporate tort as a corporate *ultra vires* act. A practical distinction is made between the two, since corporations are now held very generally liable on tort. Torts are therefore treated as corporate acts. Upon the view of corporate acting capacity here taken this is the natural treatment. The wrongful exercise of powers is as much an incident to the collective holding of rights as the exercise of powers not granted by the constituent act. The tort like the *ultra vires* act is an illegal corporate act, but the determination of its consequences does not present the same difficulties. To treat it as a void act would be as inadmissible as it would be to treat individual torts as void. The policy of the law demands imperatively that the injured party be given redress in damages. For this different treatment of torts and *ultra vires* acts the reason is given, that in an *ultra vires* contract the other party, having actual or constructive knowledge of the charter limitations, is *particeps criminis* in consenting to their violation, while the tort acts upon the injured party without his privity and consent. Another reason is, that the *ultra vires* act is done to produce legal consequences, and therefore contemplates a widening of the sphere of corporate activity, while the tort, being merely an incident to the exercise of valid powers, has no such

tendency or effect. To treat the tort as void would therefore leave the hardship inflicted upon the injured party without any justification, the plea of public policy being unavailable.

The only remaining question would be: can the liability be justified as against members of the corporation who have not been parties to the act? Where is the moral nexus between tort and responsibility, which we usually find in individual tort? Cases can undoubtedly be imagined where we might speak strictly of a corporate wrong, so where a libelous resolution should be unanimously passed, or where another unlawful act could be traced to a clear intent and active prompting on the part of the members.^{*} But these are not the torts upon which the courts have established the theory of corporate liability. A corporate tort is generally the immediate act of an officer or employee of the corporation. In some cases it can be traced to the direction, authorization, adoption, or approval of the governing board, while in others no such connection can be established. Where such connection exists, it is very usual to say that the tort is the direct act of the corporation. In other words the corporation is identified with its governing body, according to a very general and very strong sentiment, that the corporation should be held to be fully represented by the organs to which the general management of its affairs is entrusted. In reality the wrong here rests, not on corporate, but on representative action. The idea of representative wrong once admitted, it naturally extends to each other agent of the corporation, with this qualification, that the representative position of the officer or employee extends only to certain functions, and that his power to do representative wrong is correspondingly limited. Unless the tortious act of an employee is part of a general bad system of corporate management, we hardly regard it as the wrong of the corporation, because we are not apt to identify the

^{*}See *People vs. North River Sugar Refining Co.*, 121 N. Y., 582, p. 619 above quoted.

corporation with every one of its organs. But whether the tort is committed by the governing board or by another agent, the liability is equally based upon representative action. The case is quite analogous to the liability of the principal for the tort of his agent. In order to establish the desired moral nexus between act and responsibility, it is sometimes said that the liability is based upon negligence in selecting organs and employees,—a charge which would generally be incapable of substantiation. The real moral principle involved in corporate liability for tort is, that the risk and burden of acts incidental to an enterprise should fall upon those who benefit by the enterprise. It thus appears that the whole doctrine of corporate tort, like that of corporate acting capacity in general, must be based upon the idea of representation. If correct, it applies to public as well as private corporations, although the former for reasons of public policy may be exempt from liability.

Because the corporate liability for tort does not rest upon actual collective or corporate moral wrong, it cannot be used to establish the possibility of corporate crime. In so far as a crime is nothing but a tort against the public, as in case of the non-compliance with a statutory regulation or the maintenance of a nuisance, there is of course no reason why an indictment should not lie against a corporation. But in so far as crime involves moral delinquency or turpitude, the idea of representation would run counter to the principle, that moral responsibility must be direct and admits of no shifting. The same principle appears in the system of criminal penalties. A corporate crime should therefore be based upon collective wrong, and be admitted only where the latter can be established. In former times, collective wrong was perhaps more easily assumed than now. If a community was excommunicated or deprived of franchises, the idea of a collective and mutual moral responsibility was probably accepted by those who inflicted as well as by those who suffered the penalty.

At present the collective moral responsibility of persons associated is a matter of political rather than of legal cognizance. The grant of self-governmental powers to a community both presupposes such responsibility and is apt to create it. The right to associate for any purpose may be given or withheld on similar considerations. The policy of the law may also take into consideration the fact that large associations tend to diminish the sense of individual responsibility in each member, and be guided by this view in the treatment of corporations; but this, so far from being a denial, is rather an implied recognition of collective moral qualities.

§ 40. **Corporate Opinion and its Expression.**—The expression of a collective opinion by an association of persons is likewise not apt to become a matter of legal cognizance, but is of intrinsic interest as throwing light upon the capacity of aggregate bodies. Opinion and judgment are attributes of the individual mind, which, however, can be influenced by association. In a small body opinions may be so much modified by common deliberation and exchange of ideas, that the result may bear the impress of collective thought. The judgments of an appellate court may serve as an instance in point. In large aggregations of people we likewise discern mutual influences in bringing about homogeneous views, and we then speak of public opinion. The expression of opinion is, however, a matter of volition as much as of intellect, and may become the act of the body on principles of representation, if it is put forward as such. The impression of unity which is created by people associated with each other for common purposes, may easily lead others to charge them with collective opinions, which will be attributed to the body notwithstanding the dissent of individual members. In this as in other matters the collective capacity is by no means limited to definite purposes, and it may happen that a political opinion may be advanced and accepted as the opinion of a scientific or religious body. Expressions of opinion, unless

they assume the character of a libel or of a fraudulent representation, are legally irrelevant and therefore form no part of the law of corporations under our system. In France, however, it may happen that the action of a local body expressing an opinion on matters of general policy is quashed by the central government as illegal and in excess of jurisdiction, or that the body is dissolved in consequence. Similar principles are recognized in Germany. And if our courts of equity continue to extend their jurisdiction in granting injunctions as they have extended it heretofore, we may yet see the day when an association will be restrained at the suit of a member from passing resolutions of sympathy or of condemnation on the ground of their being *ultra vires*.

§ 41. **Service of Process: Corporate Notice and Corporate Residence.**—Of greater practical importance, though of less intrinsic interest, is the question of the possibility of corporate notice. This becomes relevant in the service of process, one important object of process being to communicate information to the party to whom it is issued. As corporations generally act through delegated organs, notice given to such organs binds by representation the body at large, which may remain ignorant of the proceedings. It is however recognized by legislative policy as well as by the courts, that the organs to whom notice is to be given should be really representative, so that their knowledge may be justly regarded as inuring to the benefit of the common interest; the chief or managing officers are usually designated for that purpose. Irrespective of statutory provision, notice to a mere member can certainly not be regarded as notice to the corporation, not only because the member as such is clearly distinguished from the corporation, but because, where he has no active functions, he represents only his share in the common interest, and in no sense the whole of it. If a statute provides for service upon a stockholder of a foreign corporation in the absence of any managing officers who could be served within the

state, this can be upheld, if at all, only upon the theory that the law constitutes each stockholder for that purpose a corporate officer, and makes the acceptance of such provision a condition precedent to allowing the corporation to do business within the state; but it must be doubted whether any effect would be given to such notice outside of the state or whether it can be justified on principle.¹ Notice to all the members would as a matter of fact and of equity stand on an entirely different footing. But where the statute demands service on officers, no other mode of service will be legal, since provisions regarding service of process are always *stricti juris* and must be complied with in every particular in order to confer jurisdiction.

The service of process on foreign corporations involves not only the question of notice, but also that of presence within the state. The object of the summons is partly indeed to communicate information of legal proceedings, partly however also to establish jurisdiction over the person of the defendant. It may be stated as a principle of general jurisprudence, that a personal liability cannot be created by judgment unless the defendant has been brought personally under the jurisdiction of the court rendering the judgment.² A non-resident must either voluntarily submit to such jurisdiction, or process must be served upon him within the state. Considerable difficulty was felt in this respect with regard to foreign corporations. A corporation is regarded as having its legal domicile within the state of its creation; there it is subject to the jurisdiction of the courts in such a manner, that a judgment against it will be available everywhere. But how could such a "personal" liability ever be fastened upon a foreign corporation, which, as a fictitious entity, could not migrate and therefore never be brought within domestic jurisdiction? Gradually, while the theory itself was not shaken, it came to be recognized that by another fiction

¹ *Colorado Iron Works vs. Sierra Grande Mfg. Co.*, 15 Col., 499.

² *Pennoyer vs. Neff*, 95 U. S., 727.

a corporation might be "found" where it was doing business,¹ and that it could be compelled as a condition of its being allowed to do business in another state to consent to be served there through the persons of its officers, and even to appoint agents for that purpose.² The fiction of unalterable domicile was supplemented by the fiction of voluntary submission.

If we abandon the idea of fictitious existence, it is quite clear that a corporation may have a domicile or residence like an individual. These are primarily legal conceptions, and do not mean so much physical presence as the central location of certain interests, and the place in and from which a certain activity is carried on. As an individual may reside in New York and from there administer his affairs throughout the country, so also a corporation. A corporation may also change its domicile, and can migrate in fact if not in law. It is well known that the domicile within the state of the creation has in many cases become a fiction in fraud of the law, and the substitution of a sound theory would be extremely desirable. If sometimes a doubt may exist as to the real domicile of a corporation, such doubt may equally occur in a case of an individual.

The question of physical presence, irrespective of domicile, stands indeed upon a different footing. Where the members of a corporation are scattered, it would be impossible to determine the actual collective location of the body. Here again we must have recourse to the principle of representation. We are not only justified in regarding the physical location of the governing body as that of the corporation, but as the corporation acts chiefly through delegated organs, it should be held to the burdens as well as the benefits of this liberal recognition of representative action. In other words, the presence of corporate organs in a representative capacity should be imputed to the corporation itself, with the result that the corporation, so far from being

¹ *Ex parte Schollenberger*, 96 U. S., 369.

² *Pennoyer vs. Neff*, 95 U. S., 727.

incapable of being outside of its domicile, can be in several places and jurisdictions at the same time.¹ It would therefore not seem to be necessary on principle, that the corporation should keep a place of business in another state, to be capable of being served with process there;² the transaction of some business through an officer acting within the jurisdiction of that state should be sufficient.³ It would be neither harsh nor unreasonable to hold that a railroad company enters the state whenever it runs a train through its territory, and that it is then represented by the employee having charge of the train.⁴ But the New York courts seem to stand alone in holding that a corporation can be served in the person of an officer who enters the state in a private capacity and not on corporate business.⁵ This goes beyond the sound doctrine of representation, and a judgment rendered upon such service would probably not be recognized as having extra-territorial effect.⁶

The development of the law with regard to service of process on corporations illustrates the gradually increasing recognition of the doctrine of representation. The common law considered personal service on the intangible body impossible, only its property could be attached.⁷ Then the governing officers of the corporation at the seat of its domicile were identified with it for the purpose of service. Then it became recognized that even outside the jurisdiction of its creation the corporation can be held to be fully represented by its officers, but these officers must be principal officers or general or managing offi-

¹ The idea of a double domicile seems to be recognized in *Graham vs. Boston, Hartford & Erie R. R. Co.*, 118 U. S., 161, 169.

² *Good Hope etc., Co. vs. Railway Co.*, 22 Fed. Rep., 635.

³ *Galveston City Ry. Co. vs. Hook*, 40 Ill. App. 547.

⁴ *New Albany Ry. Co. vs. Grooms*, 9 Ind. 243, Illinois Practice Act, § 5.

⁵ *Pope vs. Terre Haute Mfg. Co.* 87 N. Y. 137 against *St. Clair vs. Cox*, 106 U. S., 350; *Goldney vs. Morning News*, 156 U. S., 518.

⁶ *Moulin vs. Trenton Ins. Co.*, 24 N. J., L. 222, 234.

⁷ *Rand vs. Proprietors, etc.*, in 3 Day (Connecticut) 441 (1809).

cers "whose knowledge would be that of the corporation"¹ (it might have been said instead: jurisdiction over whose person is jurisdiction over the corporation itself). It only remains to take the further step and hold that the corporation should also be held to be represented by the principal officer, no matter whether general manager or not, through whom it acts in a foreign jurisdiction in which it has property or does business, for this is required by justice and convenience, and the idea of personal jurisdiction must in all cases alike rest upon the principle of representation.

§42. **Corporate Capacity and Representation.**—The foregoing analysis of corporate will and acting capacity should have established two points: first, that an association of persons is capable of producing distinct aggregate conditions with corresponding psychological and practical effects; and second, that the corporate acts and conditions with which the law has generally to deal are not really corporate, but representative. The aggregate conditions, however, not only necessitate and justify representation, but they also act upon it through the psychological influence of a personal nexus. There is consequently a fair presumption that the representative act truly reflects what would be the corporate will; but the law neither demands the existence of a distinct corporate will, nor actual correspondence between it and the act, in every case. It thus appears how far we must cut down the notion of an aggregate personality, if we would wish to avoid all mystical conceptions, and limit ourselves to tangible and demonstrable facts. When we speak of corporate acts, or corporate tort, or corporate notice, we mean in nearly every case representative acts, torts, or notice, and only the rights and liabilities produced thereby are really and distinctively collective.

That the psychological influence of the collective body standing back of the representative organ is a powerful reality and not a fiction, is a truth which is more apt to impress itself upon the

¹ *Newby vs. Van Oppen*, L. R. 7 Q. B. 293.

student of political institutions than upon the lawyer. Our governmental organization is very largely based upon the expectation of different action on the part of local, state, and national organs, though the personnel for either system must be drawn from the same sources. The different character of the federal and state courts is well known, but it cannot be a difference of personal origin, character or training, since the judges for both sets of courts are drawn from the same local bodies of lawyers, and it probably does not rest nearly so much upon the different tenure of office as upon the consciousness that they respectively represent different bodies politic. The same is generally true in private corporations. But it is obvious, that if courts have to determine the validity and effect of certain acts, these subtle and intangible influences cannot as a rule be ascertained, or taken into consideration. Therefore the moral capacity of the aggregate body is generally speaking for strictly legal purposes an irrelevant factor, and it is misleading to assert that every corporate act is the manifestation of corporate will and therefore of corporate personality. By abandoning the strained view of the corporation as a real person, we forego the advantage of basing the acts by which collective rights are exercised upon an undivided corporate will. The idea of a corporate, as of any other right is said to demand the constant operation of such a will. But the nature of the right can require nothing that is contrary to the purpose of a right ; if the purpose of the right is the protection of joint interests ; if divided action would destroy the joint interests, and undivided action demands that some should yield to others ; if concurrent action of all parties in interest is impracticable, and delegation offers itself as a solution of the difficulty ; then it is a practical requirement of the collective holding of rights that some may act for all ; the principles upon which individual rights are exercised, must be modified when rights are vested in an association ; the principle of the

coincidence of discretion and responsibility, of act and liability, must yield to the principle of representation.

§ 43. **Real Nature of Corporate Unity.**—Instead of seeking for an unattainable metaphysical unity, it is far better to inquire in what sense and to what extent the generally accepted idea of the unity of the association as a holder of rights is justified. The truth is that the conception of unity is derived from the operation of undivided control in the association, which in its turn is made possible by the influence of the personal nexus upon the members. The association becomes visible and active in and through individuals only, but the common purpose, the concerted action, and the combined resources, produce upon our mind the impression, that the association itself enjoys something like the power of individual personal agency.

The resulting conception is not one of absolute unity, such as the German jurists demand, and as to them appears realized in the individual will, but a relative unity, which after all is the most that we can hope to establish. Just as it is impossible to define the meaning of a physical thing as distinct from other things otherwise than by an act of mental arbitrament, which determines that there is a sufficient connection between parts, either physical or by reference to some human purpose, to justify the idea of unity, so there is no absolute objective test by which we could be forced to allow or deny the character of unity to an aggregate body of human persons. The analogy of composite things explains perfectly the nature of the association. If we treat a house, a ship, a forest, or a mine, as one thing, we do not deny that this thing is composed of many separate or severable parts, each of which may be a thing by itself. But in so far as the connection is operative, the part has no legal existence except as a part, and does not form an object of separate legal disposition; it shares the legal status of the composite thing, while as soon as the nexus is broken or only disregarded, it becomes a subject of independent treatment in law.

In like manner we treat the association as one, disregarding the separate existence of its members as individuals, in so far as their recognition as such would make the protection of joint interests an impossibility, *i. e.*, in so far as it would disturb the conditions of undivided control. If it is objected that this does not amount to true unity, the answer will be that such a unity as the objection contemplates, is not claimed, that if we adopt the strictest point of view, the unity becomes in one sense a fiction, in that sense, namely, in which the neglect of that which is practically indifferent and immaterial constitutes in strict logic a fiction. We treat many as one, because individual differences are for the moment immaterial. We say that A B C D N O P Q R enter into a legal relation with R, instead of excluding R from the party of the first part, because the difference between A Q and A R is minimal and may be practically ignored, especially as this practical neglect corresponds with actual adjustments of control and possession, and greatly facilitates the operation of legal rules. We say that A Q are the same as B R, because the loss of A and the accession of R are insignificant in view of the continuing nexus operating now and then upon B Q. In all these cases we indulge strictly speaking in a fiction, but such fictions based upon the neglect of the irrelevant are very different from fictions which mean the substitution of an imaginary conception for a substantial nonentity.

§ 44. **Imperfections of Corporate Unity.**—The relative nature of corporate unity may present difficulties which are foreign to individual personality. Cases may arise in which the elements that produce the impression of unity, identity, and distinctiveness, become vague and doubtful, notwithstanding the outward semblance of corporate existence. There will then be a conflict between technical form and substantial defect, in which the maintenance of the form may give rise to actual fictions.

The idea of identity in succession rests upon the fact, that

where the continuity of association is preserved, a change in membership is actually immaterial. This view becomes unreal, where a sudden and radical change in membership takes place. Suppose that the legislature grants a franchise to a body of designated persons and their successors. The grant of the franchise is supposed to have been induced by special confidence reposed in the grantees and is therefore untransferable, yet in form it is to the body corporate. If then the original incorporators at once transfer their interests to others as successors in the same body, the legislative intent is undoubtedly evaded, while a gradual change of membership in course of time must have been contemplated. We have seen before that the same persons may in good faith constitute two different corporations, if the nexus of association is sufficiently distinct; but a separate incorporation does not constitute actual differentiation, where the connecting bond remains substantially the same. Attempts have been made repeatedly to rid insolvent municipalities of their obligations by legislating them out of existence, and creating out of substantially the same territory and people a new and distinct corporation. But the United States Supreme Court has insisted upon treating the new corporation as the successor of the old, which was equivalent to the recognition of their substantial identity.¹ If a firm of partners in selling the good will of their business should covenant not to engage in the same business for a term of years, would they be allowed to evade this covenant by organizing themselves into a corporation and claiming the benefit of its distinctive existence? Where a corporation was organized to hinder and delay creditors, it was held that they might disregard the corporation as a void thing, and that fraud will vitiate incorporation as well as other instruments.²

¹ Broughton *vs.* Pensacola, 93 U. S., p. 266; Port of Mobile *vs.* Watson, 116 U. S., 289.

² Booth *vs.* Bunce, 33 N. Y., 139.

At what point the distinctiveness of the corporation from its members begins or ceases to be a fiction, depends upon the particular circumstances of each case. In close cases the technical aspect may easily prevail. An English act relating to the registration of vessels provided, that no foreigner should be entitled to be owner, in whole or in part, directly or indirectly, of any vessel required to be registered under the act. The authorities refused to register a vessel owned by a British company, because some of the shareholders were foreigners. It was held that the vessel was entitled to registration.¹ The decision might very well have fallen otherwise, for the provision as to indirect owning seems to require the disregard of technical title. It was admitted that the purposes of the statute might be frustrated by the incorporation of foreigners as a British company, but this was declared to be *casus omissus*, requiring remedial legislation. Perhaps the practical difficulties of inquiring into the nationality of each shareholder in a large company may have influenced the court. The doctrine of the Federal courts regarding the citizenship of corporations was ostensibly based upon similar difficulties. But it is clear that in all such cases the extreme insistence upon the distinctiveness of the body corporate from its members may work inconvenience, injustice, and, in general, legal results which are contrary to the actual state of things.²

§ 45. **Corporation and Person.** — Whether, under all the circumstances, we shall call the corporation a person, is evidently a matter of discretion. If we do, we must bear in mind that in important attributes this personality differs from that of an individual. The corporate "person" may have its distinct consciousness, and certainly has its distinct reputation; it may therefore, like an individual, suffer from libel and slander, but having no distinct physical body, it can suffer neither assault and battery, nor imprisonment. In view of the many differ-

¹ *Reg. vs. Arnaud*, 16 L. J. Q. B., p. 50.

² *State vs. Standard Oil Co.*, 49 Ohio St., 137.

ences, nothing can be gained by a dispute whether the corporate personality is "real," *i. e.*, of the same kind as that of an individual, or not. The practical question whether a corporation shall be included under "persons" depends upon different considerations.

When we speak of a corporation, as a rule we do not think primarily of a number of individuals, but rather abstractly of a human agency devoted to distinct purposes pursued under certain definite conditions. The corporation represents to us a social and economic factor which may come in conflict with any other social and economic factor; in other words, the element of distinctiveness and consequently of differentiation is present to our mind. On the other hand, when we speak of a person, what we think of is the individual in the totality of his existence. Personality in the common acceptance of the term is equivalent to individuality, and hence excludes the idea of differentiation. We may recognize that some one feels and acts differently in his official and in his private capacity, but without straining language, we do not say that this some one constitutes two different persons. We commonly ascribe to a corporation will, intent, sentiment, and action, but we probably never speak of it as a person.

Yet it does not follow that the term "person" must never be construed as including corporations. The contrary is rather true. When a statute speaks of persons, it may refer, not to individuals as such, but simply to holders of rights. Every person is simply equivalent to every one, *i. e.*, every party to a relation; and if we once admit that corporations constitute distinctive parties to legal relations, we must construe the statute so as to include them. And even where person means individual, a corporation may indirectly be within the scope of the legislative provision, as a collection of individuals, each enjoying indirectly the benefit or bearing the burden of corporate rights and obligations. While therefore constitutional bills of

rights, in accordance with the development of private liberty and property as against the state, are designed primarily for the benefit of individuals, yet corporations may be substantially within the range of their protection, in so far as the violation of corporate rights would impair the beneficial interests of the members secured through corporate organization. The presumption should therefore be that persons include corporations, and such is the accepted doctrine.

§ 46. **Value of the Corporate Conception.**—The conception of corporate unity has grown out of practical requirements and may therefore be supposed to serve practical purposes. Its chief value is, that it enables us at once to determine the incidence of the effects of legal acts done in the corporate name. We distinguish things and persons in law, because each thing may be the subject-matter of separate legal disposition, because the act of each person normally entails consequences affecting his person and his rights only. The distinction may be disregarded where its reason fails. If the connection of persons or of things is so strong that what affects one, affects all alike, we designate them by one name expressive of this unity, and the common name indicates in its turn how far the effects of certain acts extend. The consequences of an act may follow a certain nexus or bond of association rather than definite persons, and may accordingly at different times fall on different individuals: in that case the common name will both indicate and cover outwardly this shifting incidence. We then speak of identity in succession, because the most important element of identity in law is the coincidence of act and effect. The common name thus expresses the peculiar operation of the personal nexus and reflects the conception of unity in our mind. By the aid of the common name, also, the corporate rights appear more like the rights of an individual, and fancied difficulties disappear. Those who believe that all rights must be exercised like individual rights, regard it as anomalous that the rights of A B C D . . . N P Q R

should be exercised by acts in which P Q R refuse to join; but designate A R as X and it does not seem so strange that X should act independently of P Q R. The same is true as to relations between the association and one of its members (A to X instead of A to A R) and the identity in succession of changing members ($X = X$ instead of $A Q = B . . . R$). Born as these difficulties are of technical prejudices, and of the belief in the absolute value of abstract notions, they are easily overcome by the aid of technical expedients. The treatment of a corporation as a distinctive legal person is thus in one aspect an instrument of legal reasoning, a dialectical device. The fiction theory assumes that it is nothing but this, and ignores the relative psychological unity, which gives reality to the conception, and which is necessary to explain the collective attributes of the body corporate. The organic theory makes this relative psychological unity absolute, and thus carries into the law an unknown and hypothetical metaphysical quantity. Under the representation theory here submitted the idea of the corporation logically follows from the operation of the bond of association upon those subject to it, from the protection of undivided control, from the principle of representation and the consequent qualified inherence of rights and obligations in the associates. Without having recourse to a fictitious entity, this theory leads to the recognition of the essential qualities of unity, distinctiveness, and identity in succession, and thus satisfies the demands of technical jurisprudence. By showing the influence of association and representation upon individual status, action, and liability, it also gives due weight to the moral factor in corporate existence, which the organic theory unduly strains, and which the fiction theory entirely ignores.

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